

(25,161)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 396.

CECIL F. ADAMSON, PETITIONER,

vs.

DAVID C. GILLILAND.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

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COPY BOUND

Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1915, of said Court, Before the Honorable William C. Hook, Circuit Judge, and the Honorable James D. Elliott and the Honorable Frank A. Youmans, District Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the first day of October, A. D. 1914, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein David C. Gilliland is Appellant and Cecil F. Adamson is Appellee, which said transcript as prepared and printed in pursuance of the stipulation of the parties for the use of the Court upon the hearing of said cause, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 4337. In Equity.

DAVID C. GILLILAND, Appellant,
vs.
CECIL F. ADAMSON, Appellee.

Stipulation as to Printing Record, etc.

It is stipulated by and between counsel for the respective parties that this cause shall be set for hearing on Monday, May 31st, or on Monday, June 7th, 1915. It is further stipulated that the statement of the evidence and amendments thereto shall not be printed in the order in which it appears in the transcript certified by the Clerk of the District Court, but that the statement of the evidence stated by appellant shall be printed with the appellee's amendments inserted in said statement at the places called for in said amendments. It is further stipulated that the following paragraph be inserted before the second line from the bottom of page 145 (line 18, page 20, of appellant's statement) of the transcript:

"(It is stipulated that the above Exhibits, Nos. 10, 11 and 12 need

not be printed with the transcript of record. It is further stipulated that said Exhibits disclose that the application of the complainant, Adamson, which eventuated into the patent in suit, was under date June 25, 1912, declared by the Patent Office to be interference with the following applications:

Harry T. Hipwell, Pittsburgh, Pa.
 Charles E. Marshall, Indianapolis, Ind.
 Harry W. Comstock, Charlestown, W. Va.
 Frank B. Mills, Grand Rapids, Mich.
 Rudolph F. Muriset, Chicago, Ill.
 James L. McVey, Dayton, Ohio.
 William R. Major, East Palestine, Ohio;

that by a judgment rendered Sept. 24, 1912, and of said parties except William R. Major had judgment rendered against them for failure to overcome the filing date of Adamson's application, the said Adamson being the senior party to said interference, and that on Mar. 5, 1913, a final decision in favor of Adamson and against Major was duly rendered by the Patent Office, to which the said Major consented by formally waiving his limit of appeal.)"

It is further stipulated that the following paragraph be inserted after the above insertion in line 7 of page 146 of the transcript:

2 "(It is stipulated that the above Exhibit No. 13 be printed in the transcript of record. It is further stipulated that said Exhibit discloses about thirty-five separate clippings, taken from various magazines published during the years 1912 and 1913, and disclosing advertisements of as many separate and distinct portable gasoline vulcanizers for tire tubes, all embodying, both structurally and functionally, the principle of operation disclosed in the patent in suit, said vulcanizers being offered for sale by various individuals, firms and corporations, widely scattered throughout the United States.)"

It is further stipulated that the written memoranda signed "D. W. R." on page 145 of the transcript need not be printed.

CARR & CARR,
Attorneys for Appellant
 PERCY B. HILLS,
[Attorneys] for Appellee.

St. Louis, Mo., March —, 1915.

Filed Mar. 18, 1915. John D. Jordan, Clerk.

(*Citation.*)

The United States of America to Cecil F. Adamson, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the day this Citation bears date pursuant to an appeal, filed in the Clerk's office of the District Court,

of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein David C. Gilliland is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable David P. Dyer, Judge of the District Courts of the United States within and for the Eastern District of Missouri, this 12th day of March in the year of our Lord one thousand nine hundred and fourteen.

DAVID P. DYER,
*United States District Judge for the
Eastern District of Missouri.*

Service of this citation acknowledged this 14th day of March, 1914.

PERCY B. HILLS,
Solicitor for Appellee.

Endorsed: Filed in the District Court on March 19, 1914.

UNITED STATES OF AMERICA,
*Eastern Division of the Eastern Judicial
District of Missouri, ss:*

Be it Remembered, that heretofore, to-wit: on the 1st day of August 1914 there was filed in the office of the Clerk of the District Court of the United States in and for the Eastern Judicial District of Missouri, in a cause pending in said District Court No. 4198, herein Cecil F. Adamson is Complainant, and David C. Gilliland doing business under the name of Gilliland Auto Supply Company, Defendant, a Praecept of said defendant for a transcript of the record on the appeal of the said cause, which said praecipe is in words and figures, as follows, to-wit:

(Praecept for Transcript.)

the District Court of the United States, In and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4198. In Equity.

CECIL F. ADAMSON, Complainant,

vs.

DAVID C. GILLILAND, Doing Business under the Name of Gilliland Auto Supply Company, Defendant.

In making up the transcript of record for appeal in the above entitled cause, the clerk will please include therein the following papers:
1. Bill of Complaint.

2. Answer to Bill of Complaint.
3. Statement of testimony (with exhibits called for therein).
4. Decree.
5. Assignment of Errors.
6. Bond for appeal, with the approval thereof.
7. Petition for appeal, with the allowance thereof.
8. Citation.
9. Order relative to physical exhibits.
10. Praecept for transcript.

JAMES A. CARR,
T. PERCY CARR,
Solicitors for Appellant.

Received a copy of the above this 31st day of July, 1914.

HUGH K. WAGNER,
Solicitor for Appellee.

Endorsed: Filed Aug. 1st, 1914. W. W. Nall, Clerk.

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(*Bill of Complaint.*)

District Court of the United States, Eastern District of Missouri

CECIL F. ADAMSON, Complainant,
vs.

DAVID C. GILLILAND and AMENDA GILLILAND, Doing Business Under
the Name of Gilliland Auto Supply Company, Defendants.

To the Honorable, the Judges of the District Court of the United
States for the Eastern District of Wisconsin:

Cecil F. Adamson, a citizen of the United States, residing and doing
business at East Palestine, in the State of Ohio, and in the Northern
District of Ohio, Eastern Division, brings this his bill of complaint
against David C. Gilliland and Amenda Gilliland, doing business
under the name of Gilliland Auto Supply Company, and having
a regular and established place of business and committing acts of
infringement hereinafter complained of at Saint Louis, in the
County of Saint Louis, and State of Missouri, and in the Eastern
District of Missouri.

I. And, therefore, your orator complains and says, on information
and belief:

That on and prior to the first day of April, 1913, he was the
original, first and sole inventor of certain new and useful improve-
ments in portable vulcanizing devices for tires fully described in the
letters patent No. 1,057,911, hereinafter mentioned, and which
were not known or used by others in this country before his in-
vention or discovery thereof, and not patented or described in any
printed publication in this or any foreign country before his in-
vention or discovery thereof, or more than two years prior to the
application for his said letters patent, and not in public use or on

sale in this country for more than two years prior to the application for his said letters patent, and had not been abandoned to the public.

II. And your orator further shows that, being, as aforesaid, the true, original and first inventor or discoverer of the said improvements in tire vulcanizing repair apparatus, he did, on or about the twenty-fifth day of October, 1911, make application for letters patent of the United States for such invention, and duly complied with all the requirements of the statutes of the United States in such case made and provided. Whereby, after due examination of the novelty of the said invention, and in full compliance with the statutes of the United States letters patent of the United States, No. 1,057,911, were granted to your orator, under the seal of the Patent Office of the United States (signed by the Commissioner of Patents, whereby there was granted and secured to your orator, his heirs and assigns, for the term of seventeen years from and after the first day of April, 1913, the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof, as, in and by the said letters patent, or a duly certified copy thereof, in Court to be produced, will more fully appear.

III. Your orator further shows that the said invention, patented as aforesaid, is, and of right should be, of great utility and advantage to your orator; that your orator has invested and expended large sums of money and has been to great trouble and expense in and about the said invention or discovery for the purpose of putting the same into practical use, and having it manufactured and sold, and making the same profitable to your orator and of advantage to the public; that but for the infringement of said letters patent by the defendants, hereinafter complained of, your orator would in fact have gained, and of right ought to have gained, large profits from the said patented invention; that the said hereinafter complained of infringement and threats of infringement have interfered with your orator in successfully and profitably exploiting the said patented improvement, and have deterred and discouraged buyers from purchasing said patented articles from your orator under the said letters patent, and that but for such infringement and threats of infringements your orator would have derived large profits and gains from said patented invention.

IV. And your orator further shows that, as he is advised by his counsel, and believes and avers, the said letters patent No. 1,057,911 is valid and effectual in law and equity to secure to your orator the exclusive rights and privileges granted thereby, and, so far as your orator is informed and believes, the public have generally acquiesced in your orator's right under said letters patent, and that your orator is entitled to the full and exclusive use and enjoyment of said invention, and that but for the unlawful infringement and threats of infringement hereinafter complained of your orator would have been, and would now be, in the undisturbed possession of his rights and in receipt of all the profits and advantages thereof.

V. And your orator further shows that the said defendants, well

knowing the premises and your orator's rights, but contriving to injure your orator and to deprive him of the exclusive use and enjoyment of the benefits, advantages and profits which might, and otherwise would, accrue unto him from the invention covered by the said letters patent, did, as your orator is informed and believes, and so avers, after the grant of the said letters patent, and within the term of seventeen years after the grant of said letters patent, and before the beginning of this suit, at Saint Louis, in the County of Saint Louis, and State of Missouri, aforesaid, and without the license or consent of your orator, and against his will, and in violation of his rights, and in infringement of said letters patent, unlawfully and wrongfully and in defiance of the rights of your orator, make, or cause to be made, and use, or cause to be used, and sell, or cause to be sold, and is now making and using and selling or causing to be made, used and sold, portable vulcanizing devices for tires embodying the improvements covered by said letters patent, to the infringement of said letters patent and in violation of your orator's rights in the premises, and that said infringements were, and are, of great damage, loss and injury to your orator to-wit, as your orator believes, in the sum of five thousand dollars damages; and that, as your orator believes, said defendants have wrongfully made, used and sold, and are now making, using and selling, portable vulcanizing devices so as aforesaid in infringement of your orator's said letters patent, and have realized, and are realizing, large gains, savings, profits and advantages from the said unlawful making, using and selling which but for such infringement would have been and would be realized by your orator, and that such gains, savings, profits and advantages ought to be ascertained and paid over to your orator, but in what amount your orator is not informed, and, therefore, prays a discovery thereof.

VI. And your orator further shows that he particularly notified the defendants that they were infringing said letters patent and warned them to desist from infringing the said letters patent, but that said defendants have neglected and refused so to do, and have continued, and still continue, after such notice, to make and use and sell portable vulcanizing devices for tires embodying the said patented invention, and have offered and threatened verbally and by printed and extensive advertising to continue the infringement and unlawful acts.

VII. Your orator further shows that theretofore the said defendants did make, use and sell, or cause to be made, used and sold, to others to be used, portable vulcanizing devices for tires so as aforesaid, secured to your orator by letters patent of the United States No. 1,057,911, and have recently, and after your orator had notified them of their infringement and required them to desist therein, and, notwithstanding such notice, offered and threatened, verbally and by printed and extensive advertising, to make and sell, or cause to be made and sold, portable vulcanizing devices for tires embodying the said patented improvement in said letters patent contained, without the license or consent and against the will of your orator, and in violation of said letters patent, to the

great damage and injury of your orator, and in invitation and inducement to others to violate your orator's lawful rights, as secured to him by said letters patent.

VIII. Your orator prays that the said defendants, David C. Gilliland and Amenda Gilliland, may be compelled by a decree of this Honorable Court to account for and pay over unto your orator all such gains, savings and profits as have accrued or arisen to or been earned, realized or received by the said defendants, and all such gains, savings and profits as your orator would have received but for the said unlawful acts and doing of the said defendants, and all damages your orator has sustained thereby, and that this Honorable Court will assess the same of cause them to be assessed, under its direction, and will increase the damages in its discretion provided by law to thrice the amount thereof, and that the defendants, David Gilliland, and Amenda Gilliland, associates, attorneys, solicitors, clerks, servants, agents and workmen may be perpetually enjoined and restrained by decree of this Honorable Court from directly or indirectly making, or causing to be made; using, or causing to be used; selling, or causing to be sold, to others to be used, and from offering to make, use or sell, in any manner, portable vulcanizing devices for tires embodying the invention described and claimed in your orator's said letters patent, and from infringing upon or violating the said letters patent, in any way whatsoever, and that the defendants may be decreed to pay the cost, charges and disbursements of this suit; and that your orator may have such other and further relief as the equity of the case may require and to your Honors may seem meet.

IX. To the end, therefore, that the said defendants may, if they can show why your orator should not have the relief hereby prayed, and may full, correct, true and perfect answer make according to the best of their knowledge, remembrance, information and belief, to the [seventh] matters hereinbefore averred and set forth, as fully and particularly as if the same were herein repeated, paragraph for paragraph, and the defendants were thereto specifically interrogated, but not under oath, an answer under oath being hereby expressly waived, may it please your Honors to grant unto your orator a writ of subpoena ad respondendum issuing out of and under the seal of this Honorable Court, directed to David C. Gilliland and Amenda Gilliland, commanding them to be and appear and make answer unto this bill of complaint, and to perform and abide by such order and decree herein as to this Court may seem to be required by equity and good conscience.

X. May it please your Honors to grant unto your orator a provisional or preliminary injunction, to be hereafter moved for issuing out of and under the seal of this Honorable Court, enjoining and restraining the defendants, David C. Gilliland and Amenda Gilliland, attorneys, solicitors, servants, agents and workmen to the same purport, tenor and effect hereinbefore prayed for in regard to a perpetual injunction.

XI. And your orator, as in duty bound, will ever pray, etc.

PERCY B. HILLS,

Solicitor for Complainant.

CECIL F. ADAMSON.

COUNTY OF COLUMBIANA,
State of Ohio, ss:

On this 1st day of August, 1913, before me personally appeared Cecil F. Adamson to me personally known, who, being by me duly sworn, doth depose and say that he is the complainant named in the foregoing bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to these matters he believes them to be true.

CECIL F. ADAMSON.

Subscribed and sworn to before me, this 1st day of August, 1913.

[SEAL.]

ERNEST L. LYON,
Notary Public.

Endorsed: Filed Aug. 4, 1913. W. W. Nall, Clerk.

*Answer of David C. Gilliland, Defendant, to the Bill of Complaint
of Cecil F. Adamson, Complainant.*

This defendant, now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the many errors, insufficiencies, and inaccuracies in the com-
9 plainant's said Bill of Complaint contained, for answer thereto, or unto so much and such parts thereof as this defendant is advised that it is material to make answer thereto, answering says:

1.

This defendant denies that he is engaged in business with Amenda Gilliland under the name of Gilliland Auto Supply Company, but avers that he is and has been doing business as a sole trader under the name The D. C. Gilliland Auto Supply Company, and that Amenda Gilliland is not and never has been interested in said business, nor has she participated in said business in any way. This defendant admits that he has a regular and established place of business at St. Louis, Mo.

2.

This defendant denies that complainant ever was the true, original or first inventor of the alleged improvements in Portable Vulcanizing Devices for tires set forth in the alleged letters patent of the United States No. 1,057,911; and he denies that said alleged improvements had not been known or used in this country, or patented or described in any printed publication in this or any foreign country before complainant's alleged invention thereof; and this defendant denies that said alleged improvements had not been patented or described in any printed publication more than two years prior to

the filing of complainant's alleged application for letters patent therefor; and he denies that said alleged improvements had not been in public use or on sale in the United States for more than two years prior to said application; and he denies that the same had not been abandoned; but this defendant has no information with reference to complainant's averment that he had not abandoned his alleged invention or with reference to his averment concerning application for foreign patent therefor, and therefore defendant leaves complainant to make such proof of such averments as may be material and proper.

3.

This defendant admits that on the first (1st) day of April, 1913, alleged letters patent of the United States No. 1,057,911 were issued to complainant; but defendant has no information whether said alleged letters patent were issued pursuant to law and in due form of law, and leaves said complainant to make such proof thereof as may be material and proper. This defendant denies that said letters patent granted to complainant, his heirs and assigns, any exclusive right to make, use, or vend to others to be used, the alleged invention set forth therein.

4.

This defendant has no information with reference to the introduction and use of said alleged invention by complainant, or of any advantage accruing, or which might accrue, to complainant therefrom, or of his willingness and ability to supply all demands of the market therefor; and therefore this defendant leaves complainant to make such proof thereof as may be material and proper.

5.

This defendant denies that the public have generally acquiesced in complainant's alleged rights under his alleged letters patent of the United States No. 1,057,911.

6.

This defendant denies that he ever made, used or sold, or caused to be made, used or sold, devices embodying the alleged invention set forth in said alleged letters patent; and defendant further denies that he is now making, using or selling, or causing to be made, used or sold, any devices embodying said alleged invention.

7.

This defendant admits that on or about April 11, 1913, he received written notice of complainant's alleged letters patent of the United States No. 1,057,911.

8.

This defendant denies that he ever infringed or offered or threatened to infringe complainant's alleged letters patent; and he further denies that he has ever caused injury to complainant.

9.

This defendant has no information what effect his actions may have had or may have on others with respect to the disregard of complainant's pretensions under said alleged letters patent; and defendant leaves complainant to make such proof of his averments in this respect as may be material and proper.

10.

This defendant denies that complainant has suffered or will suffer any injury whatever from any of the acts or doings of defendant.

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11.

This defendant denies that the device set forth in said alleged letters patent No. 1,057,911 embodies a patentable invention; but this defendant avers that such device was within the teaching of the art to which it belongs at the date of the alleged production thereof by complainant; wherefore, this defendant says that said alleged letters patent and each and all of the claims thereof are null and void for want of invention.

12.

This defendant states that the alleged improvement described and claimed in said letters patent No. 1,057,911 was not an invention when produced by complainant, but that, prior to the alleged invention or discovery thereof by said complainant, and more than two years prior to complainant's application for said letters patent No. 1,057,911, said alleged improvement and all material and substantial parts thereof had been described, patented and published in certain letters patent hereinafter mentioned of the United States and foreign countries; wherefore, this defendant says that said letters patent No. 1,057,911 were and are null and void. This defendant sets up and pleads the following letters patent of the United States and each of them as a complete anticipation of the alleged improvement set forth in said letters patent.

No. 1,057,911, to wit:

No. 6,993, dated Jan. 1, 1850, to Lewis Stark, of Chicopee Mass.

54,477, " May 1, 1866, to Francois Stoker, of Lyons France.

87,720; " Mar. 9, 1869, to Lewis Stark, of Chelsea Assignor to himself and Frank L. Penney of Boston, Mass.

- 111,436, Dated Jan. 31, 1871, to A. M. Darrell, of Washington, D. C., Assignor to himself, Solon C. Kemon, and Lysander Hill, of same place.
- 130,332, dated Aug. 6, 1872, to J. C. Tauber, Ridgeville, Ind.
- 178,634, " June 13, 1876, to I. Hayes, Philadelphia.
- 191,908, " June 12, 1877, to Harvey L. Wells, Burlington, Iowa.
- 227,423, " May 11, 1880, to Alonzo S. Gear, New York.
- 397,872, " Feb. 12, 1889, to Charles H. Prentiss, of Cleveland, Ohio.
- 471,364, " Mar. 22, 1892, to Elizabeth Stewart, of New York, N. Y.
- 501,264, " July 11, 1893, to James M. Wishart, of North Topeka, Kas.
- 507,338, " Oct. 24, 1893, to H. W. Tibbals, of Detroit, Mich.
- 606,364, " June 28, 1898, to George W. Slater, of Philadelphia, Pa.
- 622,175, " Mar. 28, 1899, to James E. Bancroft, of Toledo, O.
- 636,236, " Nov. 7, 1899, to The National Cement and Rubber Manfg. Company, Assignee of James E. Bancroft, both of Toledo, Ohio.
- 636,739, " Nov. 14, 1899, to Charles L. Allison, of Leaf River, Ill., Assignor of one-half to Frank W. Mitchell, of same place.
- 661,095, " Nov. 6, 1900, to Carl O. Carlson, Superior, Wis., Assignee of Iver Wickland, of South Superior, Wis.
- 665,575, " Jan. 8, 1901, to Julius Muggenburg, of Chicago, Ill.
- 671,838, " April 9, 1901, to Reach.
- 711,977, " Oct. 28, 1902, to Julius Kalmar, of Raab, Austria-Hungary.
- 715,859, " Dec. 16, 1902, to Abner A. Phipps, of New York, N. Y.
- 785,633, " Mar. 21, 1905, to James M. Padgett, of Topeka, Kas.
- 830,005, " Sept. 4, 1906, to Louis E. Rice, Cedar Falls, Ia.
- 845,272, " Feb. 26, 1907, to Clarence A. Shaler, of Waupun, Wis.
- 850,385, " Apr. 16, 1907, to E. A. Scott, of Philadelphia, Assignee of Roy W. Marvell and Hill M. Ashman, of Baltimore, Md.
- 923,224, " June 1, 1909, to Harvey Frost & Co., Ltd., London, Eng., Assignee of Walter H. Welch, London, Eng.
- 933,480, " Sept. 7, 1909, to James A. Meyer, of Prairie Home, Mo.

954,424,	"	Apr. 12, 1910, to Economy Tool Company of Los Angeles, Cal., Assignee of Winfield L. Dinsmoor, of Long Beach, Cal.
965,620,	"	July 26, 1910, to Maurice Bouchet, of Paris, France.
No. 954,425, dated		Apr. 12, 1910, to Winfield L. Dinsmoor, Long Beach, Cal.
1,008,469,	"	Nov. 14, 1911, to Sanford E. Horne, San Francisco, Cal.
1,011,860,	"	Dec. 12, 1911, to General Electric Company, Assignee of Frederick F. Schwentker, Schenectady, N. Y.
1,013,063,	"	Dec. 26, 1911, to James M. Robbins and John F. Crew, of Rochelle, Tex.
1,013,357,	"	Jan. 2, 1912, to Harvey Anderson, Assignee of Fred E. Kirby, both of Kansas City, Kansas.
1,025,502,	"	May 7, 1912, to Charles E. Adamson, of Buffalo, N. Y.
1,052,430,	"	Feb. 4, 1913, to Otto Walter, of Hanover, Germany.

This defendant also set up and pleads the following letters patent of foreign countries and each of them as a complete anticipation of the alleged improvement set forth in said letters patent No. 1057911 and of all material and substantial parts thereof, namely:

British patent No. 19,881, of 1911, to De Peruzzi;
German patent No. 217,698, to Bouchet.

13.

This defendant further states that the alleged improvement set forth in said alleged letters patent No. 1057911 had been fully described in a printed publication more than two years prior to the alleged invention thereof by complainant, that is to say, in the printed record in a certain suit in the Circuit Court of the United States for the Northern District of Iowa, wherein James M. Padgett was plaintiff and Louis E. Rice was defendant, copies of which printed record are now on file in the office of the clerk of said court; and this defendant sets up and pleads said printed record as a complete publication and anticipation of the alleged invention set forth in said letters patent No. 1057911.

This defendant further states that the alleged improvement set forth in said alleged letters patent No. 1057911 had been fully described in a printed publication more than two years prior to the alleged invention thereof by complainant, that is to say, in pages 175 to 180, both inclusive, of a printed book entitled "Rubber Tires and All About Them", written by Henry C. Pearson, and published by Indian Rubber Publishing Company, New York City, 1906.

14.

This defendant further states that prior to the alleged invention by said complainant of the alleged improvement set forth in said letters patent No. 1,057,911, said alleged improvements had been and were known to and had been in public use and on sale in the United States by each of the persons named in paragraph twelve (12) hereof, as patentees and inventors in the letters patent of the United States set forth in said paragraph at the places of their respective residences as therein set forth, and also by each of the following named persons and corporations at the places hereinafter mentioned, respectively; and that such public use and sale had been for more than two years prior to the filing of said application for said letters patent No. 1,057,911, to-wit:

W. Frank Clemens, of Indianapolis, Ind., at Indianapolis;

— Downs, " " " "

Henry Engelken, " " " "

David C. Gilliland, of St. Louis, Mo. (formerly of Indianapolis),
at Indianapolis, Ind., and St. Louis, Mo.

Edward W. Gilliland, of New York City (formerly of Indianapolis, Ind.), at Indianapolis;

J. Erle Gaasch, of Ft. Worth, Tex. (formerly of Portland, Ore.),
at Portland, Ore.

L. T. Huber, of St. Louis, Mo., at St. Louis, Mo.

Ralph L. Marer, of Indianapolis, Ind., at Indianapolis;

William Watson, of Indianapolis, Ind., at Indianapolis;

— Stone, of E. Palestine, O. (formerly of Cincinnati, O.), at Cincinnati;

G. & J. Tire Co., of Indianapolis, Ind., at Indianapolis;

Ohio Rubber Works, of Cincinnati, O., at Cincinnati;

15.

Defendant further states that complainant [surreptitiously] and unjustly obtained said letters patent No. 1,057,911 for that which was in fact invented by others, to-wit, an improvement invented by Samuel Lazarus, of Cleveland, O., who was using reasonable diligence in adapting and perfecting the same; and an improvement invented by David C. Gilliland, one of the defendants herein, who was using reasonable diligence in adapting and perfecting the same.

16.

This defendant having fully answered all and singular those portions of the bill of complaint that it is material and necessary to answer, denies all and all manner of things in said bill alleged which are not hereinbefore answered unto, all of which statements and defences this defendant is ready to aver, maintain and prove as this Honorable Court shall direct; and this defendant prays to be hence

dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

DAVID C. GILLILAND.

JAMES A. CARR,

Solicitor and of Counsel for Defendant.

Endorsed: Filed Aug. 25, 1913. W. W. Nall, Clerk.

(*Interlocutory Decree.*)

District Court of the United States, Eastern District of Missouri.

No. 4198. In Equity.

CECIL F. ADAMSON

vs.

DAVID C. GILLILAND and AMENDA GILLILAND.

And now, to-wit, this 11th day of February, A. D., 1914, the above cause having come on for hearing in open court upon pleadings and proofs, and having been argued by counsel for the respective parties, and the Court being advised in the premises, it is ordered, adjudged, and decreed as follows:

1. That Letters Patent of the United States, No. 1,057,911, granted under date of April 1, 1913, to Cecil F. Adamson for Portable Vulcanizing Devices for Tires, is in all respects good and valid in law, and that the title thereto is duly vested in the complainant.

2. That the defendant, David C. Gilliland, has infringed upon the exclusive rights of the complainant under said Letters Patent, by making, using, and selling Portable Vulcanizing Devices for Tires embodying the form and construction described in said Letters Patent, and particularly set forth and claimed in the first, second, third, fourth, fifth, seventh, eighth, and ninth claims of said Letters Patent.

3. That an injunction forthwith issue under the seal of this Court permanently restraining and enjoining the defendant, David C. Gilliland, and also his agents, workmen, and employees, or his successors, from further making, using, or selling, or causing to be made, used, or sold, directly or indirectly, any portable vulcanizing devices for tires containing or embodying the invention as aforesaid patented to the complainant in said Letters Patent No. 1,057,911, dated April 1, 1913.

4. That the complainant recover from the defendant, David C. Gilliland, the profits, gains, savings and advantages which the defendant has received, or made, or which have arisen or accrued to him by reason of the making, using or selling of the portable vulcanizing devices for tires patented to the complainant by the aforesaid Letters Patent No. 1,057,911, at any time since the first day of April, 1913; and also that complainant recover from the defendant the damages which the complainant has sustained by reason of said in-

fringement; and that it be referred to Walter Davis as Master, to ascertain, take and state an account of said profits, gains, savings and advantages which the defendant, David C. Gilliland, has received or made, or which have arisen or accrued to him by reason of the infringement of said Letters Patent, and to report the same to this Court; and also to assess and report to this Court the damages which said complainant has sustained by reason of the aforesaid infringement since the first day of April, 1913.

5. That the complainant, upon such accounting and assessment of damages, have the right to cause an examination to be had of the defendant, David C. Gilliland, and of his agents, workmen, and employees, and each of them, ore tenus, or otherwise, and also to cause the production of the books, vouchers and documents of the said defendant, David C. Gilliland, before the Master, and that the said defendant, his agents, workmen, and employees shall attend for such service before the Master from time to time as he may desire and appoint.

6. That the complainant recover from the defendant, David C. Gilliland, his costs, charges, and disbursements in this suit to be taxed.

7. And by leave granted by the Court it is ordered that this bill, so far as it relates to the defendant, Amenda Gilliland, be dismissed.

DAVID P. DYER, Judge.

Endorsed: Filed Feb. 11, 1914. W. W. Nall, Clerk.

Assignment of Errors.

And now, on the 12th day of March 1914, comes defendant and says that in the record and proceedings of said Court in the above entitled cause and in the decree made and entered herein on the 11th day of February, 1914, there is manifest error, and for error defendant assigns the following:

1. The Court erred in holding that complainant's letters patent No. 1,057,911 are good and valid in law.

2. The Court erred because the evidence establishes the fact that the alleged invention set forth in claims 1, 2, 3, 4, 5, 7, 8 and 9 of complainant's patent was not new or original when produced by complainant, but had previously been completed and used and sold by others in this country; and the decree is contrary to such evidence and to the great weight thereof.

3. The Court erred because the evidence establishes the fact that the alleged infringing device used and sold by defendant had been made, used and sold by and for him prior to the alleged invention thereof by complainant; and in holding complainant's patent to be valid said decree is contrary to the evidence and to the great weight of the evidence.

4. The Court erred in not holding upon the evidence that defendant invented the alleged invention set forth and claimed in claims

7, 8 and 9 of letters patent No. 1,057,911 prior to the alleged invention thereof by defendant, and that said claims are therefore invalid.

5. The Court erred because the finding and decree in favor of complainant is contrary to the testimony and admissions of the complainant in that the court's finding and decree is not limited to the only improvement claimed as his invention by complainant in his testimony in his own behalf.

6. The Court erred in refusing defendant's request to limit
17 the injunction so that it should not restrain defendant from making, using or selling vulcanizing devices that are not provided with pins or ribs extending upwardly from the bottom of the cup portion thereof.

7. The Court erred in admitting improper testimony offered in behalf of complainant, namely, the [transcript] of testimony of David C. Gilliland taken in open court at the trial of complainant's suit against Clarence A. Shaler et al., in the United States District Court for the Eastern District of Wisconsin.

8. The Court erred in admitting in evidence the opinion and decree of Judge Geiger in the case of Cecil F. Adamson, complainant, vs. Clarence A. Shaler et al., in the United States District Court for the Eastern District of Wisconsin.

9. The Court erred in refusing to permit defendant's expert to make a physical demonstration of the operation of complainant's device at the trial of said cause.

10. The Court erred in holding that the court is bound by comity to adopt in this case the finding and decree entered by Judge Geiger in the case of Cecil F. Adamson vs. Clarence A. Shaler et al. in the United States Court for the Eastern District of Wisconsin.

Wherefore, defendant prays that the said decree may be reversed and the said Court may be directed to enter a decree dismissing said bill of complaint and dissolving the injunction.

JAMES A. CARR,
For Defendant.

Endorsed: Filed March 12, 1914. W. W. Nall, Clerk.

(Appeal Bond.)

Know All Men by These Presents:

That we, David C. Gilliland — United States Fidelity and Guaranty Company, are held and firmly bound unto Cecil F. Adamson, in the full and just sum of Five Hundred Dollars, to be paid to the said Cecil F. Adamson, his heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this — day of —, in

the year of our Lord one thousand nine hundred and —.

18 Whereas, lately at the September term A. D. 1913, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in

said Court between Cecil F. Adamson, plaintiff and David C. Gilliland, defendant, a decree was rendered against the said David C. Gilliland, and the said David C. Gilliland has obtained an appeal of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Cecil F. Adamson, citing and admonishing him to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the Condition of the above Obligation is such, That if the said David C. Gilliland shall prosecute said appeal to effect, and answer all costs if he shall fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and Delivered in Presence of—

[SEAL.]
[SEAL.]

DAVID C. GILLILAND,
UNITED STATES FIDÉLITY &
GUARANTY COMPANY,
By E. R. NIEHAUS, *Attorney in Fact.*

Approved by—

DAVID P. DYER, *Judge.*

Endorsed: Filed March 12, 1914. W. W. Nall, Clerk.

(Petition for and Order Allowing Appeal.)

The above named defendant, conceiving himself aggrieved by the decree made and entered on the 11th day of February, 1914, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

JAMES A. CARR,
For Defendant.

The foregoing claim of appeal is allowed.

DAVID P. DYER,
U. S. District Judge.

March 12, 1914.

Endorsed: Filed March 12th, 1914. W. W. Nall, Clerk.

Order Extending Time Within Which to File Record in Appellate Court.

For good cause shown, the time for filing a praecipe and statement of testimony for inclusion in transcript to be filed in this cause in the Circuit Court of Appeals, pursuant to the appeal sued out, is

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extended until the 10th day of August, 1914; and the time for filing a transcript of the record in this cause is extended until the first day of October, 1914.

DAVID P. DYER,
District Judge Who Signed the Citation.

May 9, 1914.

Endorsed: Filed May 9th, 1914. W. W. Nall, Clerk.

(Election to File Typewritten Transcript in Appellate Court, etc.)

Now comes David C. Gilliland, the above-named defendant, and elects to take a typewritten transcript of the record on appeal of this cause, the same to be printed under the supervision of the Clerk of the Court of Appeals of the Eighth Circuit.

JAMES A. CARR,
T. PERCY CARR,
Solicitors for Defendant.

Endorsed: Filed Sept. 15th, 1914. W. W. Nall, Clerk.

(Statement of Evidence Approved and Filed Sept. 15th, 1914.)

On the trial of this cause, at the September Term, 1914, of the District Court for the Eastern Division of the Eastern Judicial District of Missouri, on the 20th, 21st, 22nd and 24th days of January 1914, before the Honorable David P. Dyer, Judge of said District Court, the following proceedings were had:

Mr. Carr: If the Court please, we have been trying to get Ferdinand L. Huber to come as a witness, but in some way or other the [Marshal] has not succeeded so far in serving him and I would ask that your Honor direct the [Marshal] to make a special effort to get him to come into court. 3150 Locust Street is where he lives and has his place of business. He seems to be evading service.

20 Mr. Hills: We have made three trips out there and cannot locate him. Of course, we could leave it at the house, but service of that kind is not good.

The Court: He has stated positively he will not testify.

Mr. Hills: He is evidently evading service.

Mr. Carr: Yes, he is evading service, and we would like to have a special effort made to get him.

The Court: Will you go on without him if you can not get him?

Mr. Carr: We will go on without him if we have to.

Mr. Hills here stated that the suit would be dismissed as to the defendant Amanda Gilliland and proceed against David C. Gilliland trading as the Gilliland Auto Supply Company.

Counsel for complainant introduced in evidence a certified copy of the patent in suit, being United States Letters Patent No. 1,057,911 granted to Cecil F. Adamson, for "Improvement in Portable Vulcanizing Devices for Tires," which was marked Complainant's Exhibit 1, and is as follows:

24

1,057,911.

PORTABLE VULCANIZING DEVICE FOR TIRES.
APPLICATION FILED OCT. 25, 1911.

Patented Apr. 1, 1913.

Fig. 1.

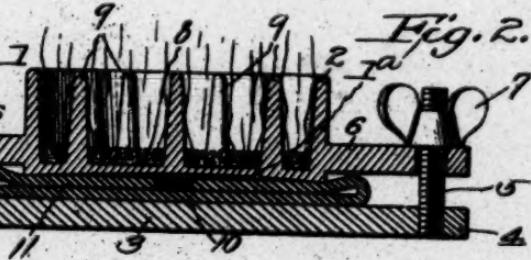
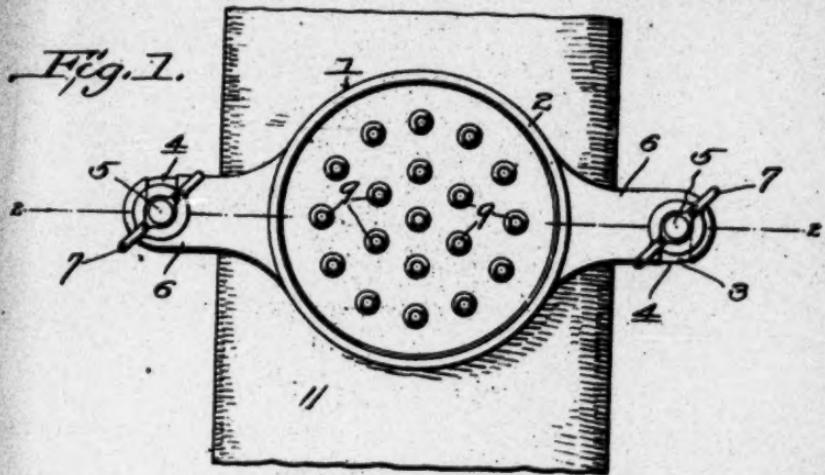
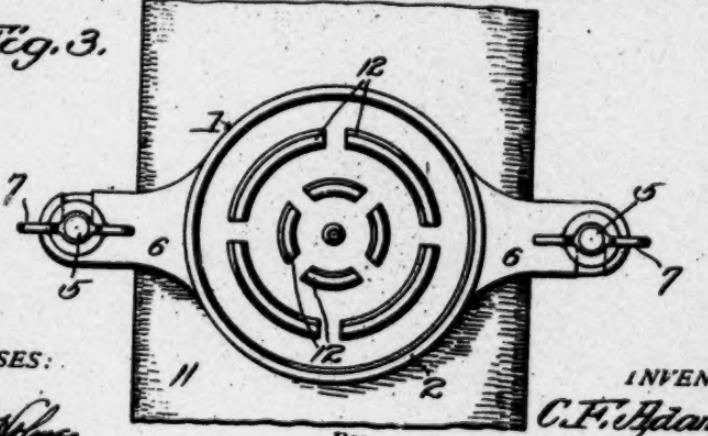


Fig. 3.



WITNESSES:

John H. Holmes
C. P. Everett

INVENTOR

C. F. Adamson

Attorney

N. S. I. Lee

CLOSE IN CENTER

2000 RELEASE UNDER E.O. 14176
EXEMPTED BY ATTACHMENT

COPY BOUND

COMPLAINANT'S EX. [I].

W. F. M.

(Certificate Omitted.)

No. 1,057,911.

In the United States of America.

To All to Whom These Presents Shall Come:

Whereas Cecil F. Adamson, of Akron, Ohio, has presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in Portable Vulcanizing Devices for Tires, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of Law in such cases made and provided, and

Whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the Law.

Now therefore these Letters Patent are to grant unto the said Cecil F. Adamson, his heirs or assigns for the term of Seventeen years from the first day of April, One Thousand Nine Hundred and Thirteen, the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this first day of April, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America the one hundred and thirty-seventh.

[SEAL.]

C. C. BILLINGS,
Acting Commissioner of Patents.

(Here follows diagram marked pages 23 and 24.)

Cecil F. Adamson, of Akron, Ohio.

Portable Vulcanizing Device for Tires.

Specification of Letters Patent.

1,057,911.

Patented Apr. 1, 1913.

Application Filed October 25, 1911. Serial No. 656,604.

To all whom it may concern:

Be it known that I, Cecil F. Adamson, citizen of the United States residing at Akron, in the county of Summit and State of Ohio, have invented certain new and useful Improvements in Portable Vulcanizing Devices for Tires, of which the following is a specification.

The present invention relates in general to devices for vulcanizing rubber, and more particularly to that type of vulcanizing device which are adapted to be employed for the repairing of tires or the like.

Among the objects of the invention is to provide a vulcanizing device which is simple and inexpensive in its construction, which is light and compact in its design and can be readily carried from place to place, which can be easily and quickly applied to the member to be vulcanized, and which will operate in a quick and effective manner to vulcanize the rubber to which it is applied.

A further object of the invention is to provide a vulcanizing device which embodies novel features of construction whereby the use of a steam or water jacket is eliminated and the vulcanizing member is heated directly from the flame, the temperature of the vulcanizing member being automatically controlled without the use of any special or complicated mechanism.

With these and other objects in view, the invention consists in certain novel combinations and arrangements of the parts as will more fully appear as the description proceeds, the novel feature thereof being pointed out in the appended claims.

For a full understanding of the invention, reference is to be had to the following description and accompanying drawings, in which

Figure 1 is a top plan view of a vulcanizing device constructed in accordance with the invention. Fig. 2 is a longitudinal vertical sectional view through the same on the line 2—2 of Fig. 1, and Fig. 3 is a top plan view showing a modified construction of the vulcanizing device.

Corresponding and like parts are referred to in the following description and indicated in all the views of the drawing by the same reference characters.

Specifically describing the embodiment of the invention illustrated by Figs. 1 and 2 of the drawing, the numeral 1 designates a vulcanizing plate which may be of any desired shape and size and

is designed to have one face thereof applied to the material to be vulcanized. In the present instance the lower surface of the plate constitutes the vulcanizing surface and is slightly concaved, as indicated at 1^a. An annular or continuous flange 2 projects upwardly from the plate 1 so as to form a receptacle adapted to receive some combustible fluid such as gasoline or alcohol. Any suitable means may be employed for holding the vulcanizing plate against the material to be vulcanized, and in the present instance this result is accomplished by means of a clamping plate 3 which cooperates with the vulcanizing plate or member to grip the material to be vulcanized. The clamping plate 3 is illustrated as provided at opposite sides thereof with ears 4 which carry clamping screws 5, the said clamping screws being adapted to be engaged by hooked ears 6 which project from opposite sides of the vulcanizing member or plate 1. Thumb nuts 7 are applied to the clamping screws 5 and constitute a means for drawing the clamping plate against the vulcanizing member so as to firmly grip a rubber tire or like object placed between the same.

In order to heat the vulcanizing member or plate 1, a suitable quantity of some combustible liquid is placed in the receptacle, as indicated at 8 in Fig. 2, and the surface of the combustible fluid ignited. It has been found that the desired temperature at which the vulcanizing member 1 should be retained in order to effectively vulcanize the rubber is substantially the same as the boiling point of the gasoline or like combustible fluid which is placed in the receptacle. The combustible fluid 8 rests upon the vulcanizing plate and is in direct contact therewith at a point opposite the vulcanizing surface, so that the combustible fluid and vulcanizing plate are simultaneously heated and have approximately the same temperature. It will also be observed that the combustible fluid is interposed between the flame or combustion and the vulcanizing plate so as to form a protecting agent and prevent the vulcanizing plate from being overheated by the flame.

It has been found desirable to provide some means for conducting the heat from the flame above the combustible fluid down into the combustible fluid and vulcanizing member. In Figs. 1 and 2 of the drawing the vulcanizing member or plate 1 is shown as provided with a series of posts 9 which project upwardly through and above the combustible fluid 8. The flame caused by the combustion of the gases rising from the combustible fluid acts upon the upper ends of these posts 9, the said posts serving to conduct the heat downwardly into the vulcanizing plate and combustible fluid.

Assuming that it is desired to apply a patch to the inner tube of a pneumatic tire, a piece of suitably prepared rubber 10 would be applied to the defective portion of the tube 11 and the said members clamped between the clamping plate 3 and the vulcanizing member or plate 1. A suitable quantity of combustible fluid 8 would then be placed in the receptacle and ignited. The flame caused by the combustion of the gases rising from the combustible fluid would act directly upon the posts 9 and heat would be con-

ducted by the posts down into the combustible fluid and the vulcanizing plate. As the temperature of the vulcanizing plate and combustible fluid rises, the rapidity with which the gas is given off from the surface of the combustible fluid increases so that the zone of combustion rises within the receptacle. This rising of the flame is due to the fact that the rapid generation of the gas prevents the air from mixing therewith in the necessary proportions to produce combustion until after the gas has risen to a greater height above the surface of the fluid than would be necessary where the fluid was at a lower temperature and the generation of gas less rapid. When the temperature of the vulcanizing plate reaches the maximum point which is desired for vulcanizing purposes, the generation of gas at the surface of the combustible fluid will have become so rapid as to force the flame entirely up to the top of the flange 2 and the posts 9. The flame then becomes ineffective for the purpose of heating the posts of receptacle, and the temperature of the vulcanizing plate and combustible fluid will gradually lower until the flame again drops within the receptacle and becomes effective. The height of the flame above the surface of the fluid and the consequent effectiveness of the flame as a heating agent is thus regulated by the temperature of the combustible fluid so as to automatically control the temperature of the vulcanizing member or plate 1 and prevent the same from becoming either over or under heated during the vulcanizing operation. This operation will continue until the combustible fluid 8 has been entirely consumed, and it has been found that the vulcanizing effect will continue for a short period after the flame has extinguished, owing to the heat which is retained by the vulcanizing member. At the expiration of the proper time required for vulcanization the vulcanizing member is removed, the process being completed. It is also possible to place a predetermined quantity of the combustible fluid within the receptacle so that the vulcanization of the rubber will then have been completed by the time the fluid has been consumed, at which time the vulcanizing member would be removed from the tire.

A slight modification is shown in Fig. 3 in which a series of segmental ribs 12 arranged in concentric annular series are substituted for the posts 9 previously described. The effect of the flame upon these ribs 12 is identical with that previously described in connection with the posts 9, it being merely desirable to provide some heat conducting mediums for conveying the heat from the zone of combustion above the combustible fluid down into both the combustible fluid and the vulcanizing member.

Having thus described the invention, what I claim as new and desire to secure by Letters Patent, is:—

1. A vulcanizing device including a vulcanizing member constructed to retain a combustible fluid, the said combustible fluid being in contact with the vulcanizing member whereby the fluid and vulcanizing member are simultaneously heated by the combustion of the fluid.

2. A vulcanizing device including a vulcanizing member constructed to retain a combustible fluid upon and in contact with its

upper surface, the lower surface of the vulcanizing member being adapted to be applied to the material to be vulcanized.

3. A vulcanizing device including a vulcanizing member constructed to retain a combustible fluid upon and in contact therewith, and means for conducting heat from the combustion of said fluid to the said vulcanizing member.

4. A vulcanizing device including a vulcanizing member constructed to retain a combustible fluid upon and in contact with its surface, and means for conducting heat from the combustion of said fluid into said member and combustible fluid which are heated simultaneously, the quantity of heat conducted to said member and combustible fluid being automatically controlled by the temperature of the combustible fluid.

5. A vulcanizing device including a receptacle adapted to contain a combustible fluid, the bottom of the receptacle constituting a vulcanizing member, and means for conducting heat from the combustion of the gas given off by the heated combustible fluid into the combustible fluid and vulcanizing member, the flame of combustion being raised and lowered in the receptacle according to the temperature and consequent volume of gas given off by the combustible fluid so as to automatically control the temperature of the vulcanizing member.

6. A vulcanizing device including a vulcanizing plate having a lower face adapted to be applied to the material to be vulcanized and constructed to retain a combustible fluid upon and in contact with its upper surface having a lower face adapted opposite the vulcanizing surface so as to form a protecting agent between the flame at the top of the combustible fluid and the vulcanizing plate.

7. A vulcanizing device including a vulcanizing plate having a lower face adapted to be applied to the material to be vulcanized, continuous flange projecting from the plate so as to form a receptacle adapted to receive a combustible fluid, and a heat conducting projection extending from the vulcanizing plate through and above the combustible fluid.

8. A vulcanizing device including a vulcanizing plate having a lower face adapted to be applied to the material to be vulcanized, continuous flange projecting from the plate so as to form a receptacle adapted to receive a combustible fluid, and a heat conducting projection extending from the vulcanizing plate through and above the combustible fluid, the before mentioned flange projecting above the surface of the combustible fluid so as to confine the gases given off by the same and cause the flame to rise and fall within the receptacle and thereby automatically control the temperature of the vulcanizing plate.

9. A vulcanizing device including a vulcanizing plate having a lower face adapted to be applied to the material to be vulcanized, continuous flange projecting from the plate so as to form a receptacle adapted to receive a combustible fluid, and a series of heat conducting posts projecting from the vulcanizing plate through and above the combustible fluid.

In testimony whereof I affix my signature in presence of two witnesses.

CECIL F. ADAMSON.

Witnesses:

H. S. HILL.
H. C. ROBB.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

29 Mr. Hills: I offer in evidence the structure manufactured and sold by the defendant, David C. Gilliland. This my brother Carr will stipulate was sold after the issue of the patent and prior to the commencement of the suit, and I will include with it the box and the directions for using it, which were sold with it. I offer this as "Complainant's Exhibit No. 2."

The structure last referred to was thereupon marked "Complainant's Exhibit 2."

Mr. Hills: I wish to state to your Honor that this patent has recently been adjudicated in the United States District Court for the Eastern District of Wisconsin, Judge Geiger rendering an opinion from the bench after full trial and proofs. I, therefore, offer in evidence a certified copy of that decree entered the 17th day of December, 1913, in that cause.

Mr. Carr: That is objected to as incompetent, irrelevant and immaterial to any of the issues in this case. The defendant here was not a party to that suit and is not bound by it.

The Court: I will allow it to go in subject to your objection. I will take the testimony subject to your objection and rule on it later. Where either party has testimony that they think is material I am going to let it go into the record and then I will hear your objections to it later on, if you desire to put in any.

To which ruling of the Court, the defendant by his counsel, then and there, at the time, duly excepted.

The decree last referred to was accordingly marked "Complainant's Exhibit No. 3," as follows:

"District Court of the United States, Eastern District of Wisconsin.

CECIL F. ADAMSON, Complainant,
vs.

CLARENCE A. SHALER, F. E. JONES, and W. E. GRAHAM, Copartners
Doing Business under the Firm Name and Style of C. A. Shaler
Company, Defendants.

Decree.

And now, to-wit, this 17th day of December, A. D. 1913, the above cause having come on for hearing in open court upon pleadings and proofs, and having been argued by Counsel for the respective parties,

and the Court being advised in the premises, it is Ordered, Adjudged and Decreed as follows:

1. That letters patent of the United States No. 1,057,911, granted under date of April 1, 1913, to Cecil F. Adamson for Portable Vulcanizing Device for Tires, is in all respects good and valid in law, and that the title thereto is duly vested in the Complainant.
2. That the Defendants have infringed upon the exclusive rights of the Complainant under said letters patent, by making, using and selling Portable Vulcanizing Devices for Tires embodying the form and construction described in said letters patent, and particularly set forth and claimed in the first, second, third, fourth and fifth claims of said letters patent.
3. That an injunction forthwith issue under the seal of this Court permanently enjoining and restraining the Defendants, Clarence A. Shaler, F. E. Jones, and W. E. Graham, Copartners, doing business under the firm and style of C. A. Shaler Company, and also their agents, workmen and employees, or their successors, from further making, using or selling, or causing to be made, used or sold, directly or indirectly, any Portable Vulcanizing Devices for Tires containing or embodying the invention as aforesaid patented to the Complainant in said letters patent No. 1,057,911.
4. That the Complainant recover from the Defendants the profits, gains, savings and advantages which the Defendants have received or made, or which have arisen or accrued to them by reason of the making, using or selling of the Portable Vulcanizing Device for Tires patented to the Complainant by the aforesaid letters patent No. 1,057,911, at any time since the first day of April 1913; and also that Complainant recover from the defendants the damages which the Complainant has sustained by reason of said infringement; and that it be referred to John F. Harper, Esq., as Special Master, to ascertain, take and state an account of said profits, gains, savings and advantages which the Defendants have received or made, or which have arisen or accrued to them by reason of the infringement of said letters patent, and to report the same to this Court; and also assess and report to this Court the damages which the Complainant has sustained by reason of said infringement since the aforesaid first day of April, 1913;
5. That the Complainant upon such accounting and assessment of damages have the right to cause an examination to be had of the Defendants, and of their agents, workmen and employees, and each of them, ore tenus, or otherwise; and also to cause the production of the books, vouchers and documents of the said Defendants before the Master, and that the said Defendants and their agents, workmen and employees shall attend for such service before the Master from time to time as he may desire and appoint.
6. That the Complainant recover from the Defendants his costs, charges and disbursements in this suit to be taxed.
7. And by consent of counsel for defendants, it is ordered, adjudged and decreed that the counterclaim in the defendant's answer be, and the same hereby is dismissed without prejudice.

(Signed)

F. A. GEIGER, Judge."

4-396

On the back of the above document appears the following: "No. 427 Civ. Doc. U. S. District Court, East. Dist. of Wis. Cecil F. Adamson vs. Clarence A. Shaler et al. Certified copy of Decree. Filed Dec. 17, 1913. F. C. Westfahl, Jr., Clerk."

Mr. Hills: I may state that we expect to prove that David C. Gilliland participated actively in that defense and gave testimony in that defense, and I think it is particularly material on that ground.

The Court: Let it go in.

Mr. Hills: I also desire to offer in evidence a certified copy of the opinion of the Honorable F. A. Geiger, filed in said cause.

Mr. Carr: That is objected to on the same ground as the decree.

Mr. Hills: I offer the opinion to be received and marked "Complainant's Exhibit 4."

Mr. Carr: I understand your Honor is not ruling finally on this and there is no occasion for us to save exceptions?

The Court: State your objection to the testimony and I will rule on it later.

Mr. Carr: All right.

The Court: Let it go in.

Said opinion was accordingly marked "Complainant's Exhibit 4" and is as follows:

32 "District Court of the United States, Eastern District of Wisconsin.

CECIL F. ADAMSON, Complainant,

vs.

CLARENCE A. SHALER and F. E. JONES, Copartners, Doing Business under the Firm Name and Style of C. A. Shaler Company, Defendants.

Decision by Hon. Ferdinand A. Geiger.

By the Court: The case has been presented in a way that is rather enlightening in the way of endeavoring to reduce my conclusions to a formal opinion, but I think I will announce my conclusions now.

I am satisfied that so far as the first defense that is asserted is concerned, there is nothing in the prior art of patents, and I do not believe there is anything in the prior arts structures that discloses the Adamson structure as he has presented it at this trial. Of course, he has the benefit of a presumption that the patent office has accorded him. I think that presumption is strongly fortified by a detailed examination of the prior art structures, both the patent structures and others, as they have been exhibited here in court.

I do not think there is any doubt but that prior to the appearance of Mr. Adamson on the field of exploration the idea was known that a vulcanizing process could be carried on through the use of a gasoline liquid enclosed in structures similar to those which have been exhibited here, the Inman structure and the Gilliland ladle; but there is a remarkable difference in structure alone between any of these and the structure of the Adamson patent. I haven't any

doubt that the patent office regarded the disclosure made in his application as being entirely novel, and that his patent was readily accorded to him because of the very patent differences between all prior art structures and his; and I believe that the evidence which has been produced here respecting the receipt and acceptance of the structure in the automobile trade fortifies very strongly the presumption which the patent office accorded him. It may be true, as suggested by counsel, that the moment the Adamson structure was disclosed it was accepted by every one because of the want of knowledge; that all those interested in structures of that kind and in some structures that would discharge that function immediately realized that it contained nothing new, and that it was a mere fortuitous event—the disclosure of the Adamson structure—which they were at liberty to adopt; but I think the contrary view is the one which, under the law, must be taken; that the ready acceptance of it, the eagerness to appropriate in one form or a closely allied form is very cogent evidence of its novelty; and I am dear that the patent must be sustained on that ground.

I do not believe that it is anticipated by the Inman structure; and I will pass that as being covered by what I have said.

The feature of the case disclosed by the claim of the defendant that Gilliland was the inventor, if there was invention, of this structure, is to my mind a very interesting one, and affords rather a wide opportunity, a large opportunity, for discussion of the inferences properly to be drawn. In the giving of Mr. Gilliland's testimony, I was impressed, and that impression, and the conviction, has not been shaken by anything which has been said here in argument respecting the improbability of its truth. As I suggested, in interrupting counsel, it may be that if Mr. Adamson's testimony is taken and analyzed closely, there can be many conjectures indulged respecting the improbability of the shaping of events; but his testimony as a whole is clear, and as I regard it, straight-forward, and not inherently improbable. I did not get the impression from his testimony that the whole idea which is embodied in his patent, and which is disclosed in the sketch which is offered in evidence, and his original disclosure to the witness McCormish—that it all happened in the course of a few minutes; but I think a fair construction of his testimony, as well as that of McCormish, is that the matter had been under discussion. Adamson's profession is such, his daily activities were such as would equip him fairly well to approach a problem of this kind. He had a fund of information, some learning on the subject, which, as between him and Gilliland, puts him in a position where what he said respecting his achievements can be quite readily accepted and without suggestion of inherent improbability.

Mr. Gilliland testifies that he first got the idea of this structure about July 25, 1911. A suggestion was made to him by the witness Huber; that he at once went to his home, where he had a hand lathe, and turned out practically the structure as here introduced in evidence to the court. I do not believe that this testimony can be accepted to the exclusion of a reasonable doubt. I believe Mr. Gilliland's own activities long prior to this time in the way of using the ladle as he has testified created a situation where we would

naturally expect he would make a little fuller disclosure as to what he did. He is not a professional man. I should say that as between him and Mr. Adamson he was at a disadvantage in the development of any idea, whether it was his own, or suggested by him. That between the date which he gives, July 25th, and August 2nd, he should perfect this and ask that his statement be accepted without any corroboration whatever in the way that the statements are usually corroborated, by the production of drawings, models and more detailed description of the failures which all must have in the development of an idea, cannot and should not be accepted to the exclusion of a reasonable doubt as against the statement given by the complainant here. That I am unwilling to do, and will find against the defendant upon that ground.

This leaves merely the question as to infringement.

I believe the defendant's structure infringes the complainant's patent. I think the basic idea of the complainant's structure is substantially incorporated, and whatever change may have been brought about in the use of a cap I do not believe can in any way relieve the defendants from the consequences of adopting the basic idea of the complainant's patent. There will be a decree for the complainant.

With respect to the counterclaim Of course, we have not gone into that, and I am disposed at this time to dismiss it without prejudice. It is possible that even though the complainant's patent is valid the he, nevertheless, could have been guilty of the act of unfair competition charged in the counterclaim. But, as I stated this morning, in the unfair competition cases, the gravamen of the case is the tort, and the primary relief, at least where a short space of time intervenes, is injunction. This suit was instituted rather a short time ago, and I do not believe, whatever the merits of the counterclaim may be, that the defendants have suffered very large damage; but I do not care to foreclose them from asserting that; and the decree will be for the complainant on his bill, against the defendant on the counterclaim, but without prejudice on the counterclaim.

Mr. Hills: I am perfectly willing to submit the matter of the counterclaim, without argument, on the letters and circulars. I believe that they are proper letters to send out under the circumstances.

The Court: Of course, the counterclaim involves a detailed examination of the evidence.

Mr. Hills: The only evidence was the circular letter sent out by the complainant.

The Court: The principle governing that thing is pretty well settled; at least, in this circuit."

35 Mr. Hills: There have been certain stipulations entered into, and with the approval of Mr. Carr I will state them briefly to the Court:

Further, the stipulation is that copies of testimony, evidence and depositions, as well as exhibits, taken in behalf of complainant at Akron, Ohio, December 1, 1913, and taken in behalf of defendant at Dayton, Ohio, November 6, 1913, in advance of final hearing in the suit of Cecil F. Adamson versus Clarence A. Shaler, et al.

pending in the United States District Court, in and for the Eastern District of Wisconsin, may be used in the above entitled suit with the same force and effect as original depositions could be used if entitled and taken for use in behalf of the above named parties, and the signatures of the several witnesses to said copies is waived.

(*Testimony for Complainant.*)

FRED GERACH, a witness for complainant, testified as follows:

Direct examination:

My name is Fred Gerlach; age 43; I live at Chicago; my occupation is solicitor of patents and mechanical expert in patent causes. During the last 23 or 24 years my entire time has been devoted to matters relating to invention and patents, preparation of specifications of patents, descriptions of mechanical devices and in connection with patent causes. I have very frequently testified as a mechanical expert in patent causes. I have read and understand the patent in suit.

Mr. Hills:

Q. I hand you a drawing and ask you if you know what it is (handing paper to witness)?

Mr. Carr: If your Honor please, expert testimony is notoriously long drawn out. We admit making the device; we admit that it falls within the scope of the claims; we admit everything else that is essential to the complainant's *prima facie* case, and it strikes me we are only wasting time listening to an expert who is explaining something that is already admitted.

The Court: The objection will be overruled.

To which ruling of the Court the defendant by his counsel, then and there, at the time, duly excepted.

8 The Witness: This drawing represents the operation of the vulcanizing member of the device shown in the patent No. 1,057,911. The first view, or the view at the top of the drawing, indicates the operation when the gasoline is first ignited. The second view illustrates the operation after the vulcanizer has been in operation for a sufficient time to thoroughly heat the parts.

Mr. Hills:

Q. Please describe briefly this construction of the patent in suit and in doing so you may use the drawing to which you have referred, for illustration.

Mr. Carr: The same objection is repeated.

The Court: The objection will be overruled.

To which ruling of the Court the defendant by his counsel, then and there, at the time, duly excepted.

A. The device shown in the patent is for vulcanizing patches on rubber articles such as rubber tires. It has two members, the upper

member of which is a cup shape; the bottom of which forms a vulcanizing plate and is adapted to be pressed against the patch that is to be applied to the work. The lower plate (marked 3 in the drawing) and the screws (5) are adapted to clamp the rubber tire and the patch against the bottom of the receptacle. In operating the device a quantity of gasoline, liquid gasoline, is poured into the cup. It is ignited and initially the combustion is very slow because there is nothing to accelerate the vaporization of the gas so that the flames play upwardly from about the top level of the gasoline and out of the open top of the cup. The flames in passing upward heat the posts that are cast in pieces with the bottom of the cup, and these posts conduct heat to the bottom plate and also to the liquid gasoline. As the posts conduct the heat down into the gasoline, the gasoline becomes hot and vaporizes and the result is that the vapor passes upwardly so rapidly that no combustion occurs, no ignition occurs, until the vapor reaches about the level of the cup, the air heating the vapor at about the level of the cup and about the top of the posts. After it has been heated, the initial point of combustion is in the neighborhood of the top of the pins; as the vapor is formed more rapidly by the heating of the posts and the bottom the flame will tend to rise, that is, the initial point of combustion will rise away from the top of the point and conduct or impart less heat to the posts, and as a result less heat will be conducted to the bottom of the cup or the vulcanizing plate; so that the operation in limiting the maximum temperature is automatic as a result of the

operation which bring the tops of the posts more or less into
37 the flame from the vapor rising from the gasoline; so that the device limits or controls itself in temperature and the excessive heat is not conducted to the vulcanizing plate, which might burn the rubber. One of the characteristics of the device is that the flame is passing away from the work and not towards it as it would if the lamp were held under the plate, and that is one of the things that contribute to the automatic regulation of the temperature of the device. After the gasoline has all been taken out and the device goes out, the vulcanizing operation is substantially completed.

By Mr. Hills: I will ask you, Mr. Carr, do you wish for a stipulation that defendant's vulcanizer is an infringement or is like those, or have you withdrawn it?

Mr. Carr: No, we will stipulate that it is within the scope of every one of the claims of the patent.

(Cross-examination omitted.)

CECIL F. ADAMSON, a witness on his own behalf, testified as follows:

My name is Cecil F. Adamson; 32 years of age; residence, East Palestine, Ohio; occupation, operating as Adamson Manufacturing Company.

During the summer of 1911, when my attention was brought to the necessity of a cheap simple vulcanizer to be used in repairing

"Complete Exhibit No. 5" Adamson v. Gililand
#204914 in Court #4198-20. also Court

See Photo 2028

C. F. ADAMSON
CONSULTING ENGINEER
GENERAL ENGINEERING INSTRUCTOR
HAMILTON BUILDING, AKRON, OHIO



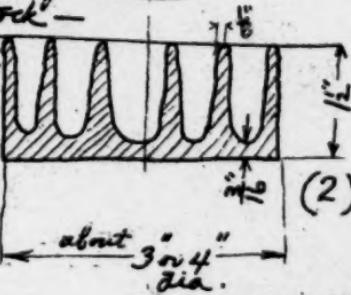
(1)

make this one
first - out of
solid stock -

Cast Iron



(3)



(2)

Flame pattern made for
Brass -



(4)



(5)

Repair Vulcanizer
C. F. Adamson
Date - Aug 19 - 1911 -

Thickness -

Phillie Tormek
Cherry engraving

12.0

49

39

40

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ires—I had had quite a bit of experience in the dissatisfaction resulting from the use of other repair patches and the cure outfits, and so forth, and it was continually acknowledged in the automobile tire business that the only satisfactory method of repairing a tube was to actually vulcanize a patch done by heat, as was the usual method for repairing tubes in the repair shops. I was familiar with the different vulcanizers then on the market, including steam vulcanizers and others, of which, as I remember, the least cost of such devices was in the neighborhood of \$12.00. I started to give some thought to the vulcanizers along those lines and it also occurred to me that it was very necessary in order to obtain the quick results in making repairs, to have a repair done with exceptionally quick cure. I experimented with repair guns at that time, being interested in the manufacture of rubber tires and was directly interested in the compounding of rubber in the rubber business. I worked out a repair gum which was exceptionally quick and which was, to my knowledge, something new at that time, and after giving considerable thought as to the different methods of regulating temperature which would result in a vulcanizer which would be cheap and simple, I conceived certain ideas that would possibly carry out the results desired. After a month or two or three I had occasion to have one of my [draftsman] at East Palestine, and one evening I sat down and explained what I had been thinking of and described it to him.

At that time I was spending the major part of my time at the McGraw Tire & Rubber Company, East Palestine, Ohio, as superintendent and looking after the factory in general. I also operated an engineering office at Akron, Ohio, as a consulting engineer. Mr. McCormish and several draftsmen were associated with me there at times. Mr. McCormish was the one who was associated with me most closely.

One evening I described the device to Mr. McCormish and instructed him to go back to Akron and have some patterns made, to turn out an experimental device. This was at East Palestine. Mr. McCormish was in the habit of coming down to see me several times a week on other matters, and one evening before the train left I made a sketch for him and told him what I wanted to do. That was at my residence at East Palestine.

Said sketch was here produced and identified by the witness and was offered in evidence and marked "Complainant's Exhibit No. 5," and is as follows:

(Here follows diagram marked pages 39 and 40.)

41 The first thing I did was to instruct Mr. McCormish to make a certain experimental device for me, but before beginning I endeavored to describe to him the principle of the device which I had in mind. I started and drew a little [diagram-atic] sketch in the corner as indicated by No. 1. I described to him how the heat-conducting member, if surrounded by combustible fluid, could be utilized to automatically limit the temperature or regulate the temperature of the vulcanizing device. I showed to him how the combustion of the fluid would be forced upward as the increased volume of gas was given off to the heating of the combustible fluid. I told him the principle I had in mind was having the combustible fluid in contact with the vulcanizing member whereby it would heat simultaneously, and as the increased volume of gas would occur it would automatically affect the position of the combustion shower, which would force it away or in closer contact with the heat-conducting member. I remember when I made this sketch showing him how this member could be made higher or lower in order to maintain a certain maximum temperature. I did not know exactly how high that would have to be, but I knew wherever it would be it would be a certain automatic regulation which would prevent the device from rising above a certain temperature. I afterwards started and discussed his opinion of it and one thing and another, but after talking—I think we had other sketches at the same time which I was making—but I finally told him to take a solid piece of cast iron, or have the machinist take a piece of cast iron, and have this device made shown by Figures 2 and 3. Figure 3, by the way, is a plain view of Figure 2, which is a sectional view of the same device. I told him to have this turned out as a solid piece of metal at least expense, and I believe I made a note on here (indicating Complainant's Exhibit 5) to make this one first out of solid stock. I also told him I could cut the outer rim higher or lower in order that the flame would be more or less effective on the heat-conducting members and I would do that myself after receiving this. I also told him that possibly a more uniform or [sym-etical] arrangement could be carried out by having a pattern made of the design shown in Figures 4 and 5, which is the same device. And he said that he would have this pattern made and he would also make the first construction, and send it to me promptly.

42 That was August 19, 1911.

Q. I observe "Aug. 19, 1911" written on there (indicating "Complainant's Exhibit No. 5"): Who wrote that and when was it written?

A. I wrote that myself on August 19, 1911. That is my signature.

Those witnesses signed this drawing at the same time the drawing was made, just after it was finished and Mr. McCormish was taking it with him, August 19, 1911. He is the first one who signed. I made this writing here (indicating) and left room for the witnesses to sign the drawing; in fact, I was in the habit of doing this in my previous experience in patent matters, and by the instruction of Mr. Hills at one time several years ago, who told me to always have

rawings witnessed wherever it was possible, and I have always done
at on all drawings I have made.

Phylis Gregory is a daughter of Mr. Gregory, who is my father-
law, living at the same residence, at East Palestine. Mr. Charles
Gregory is the father of the daughter I refer to.

Mr. McCormish left that evening on the train for Akron, saying
that he would have the device made and send it to me. I did not
hear from him for several days. Finally, he did not send it to me,
but it was on Labor Day, 1911, I went to Akron, and up to that time
he had not sent me the device.

I told him I would take the drawing back with me and have it
made at the machine shops at East Palestine, seeing that he was very
busy, and I wanted it, I was anxious to get it. I brought the draw-
ing to East Palestine and I think the next day instructed the ma-
chine to turn one of those out with a piece of solid metal, which
he did. I still have the original device. This is the original device
that was made, with the exception that it now has pins in the center
whereas the first device was made with concentric rings (producing
a device). The first that was made had two concentric rings in the
center and I took that the same evening it was made and experimented
with it, and I found by placing the gasoline in the different cavities
and igniting it that the combustion would not be sustained; that it
would flash and then it would go out. In fact, it occurred to me
that it was not getting oxygen enough to sustain combustion be-
cause the gasoline was confined too much. It was also necessary to
move the gasoline in the different compartments. Then the next
morning I took the device and cut slots in the rings so as to prevent

the gasoline from flowing from one compartment to another,
and tried that, and still combustion would not continue.

However, I did vulcanize with it even in the first construc-
tion by leaving a match resting in the fluid. When I would ignite
it I would leave the match laying in the vulcanizer and that would
allow the device to heat in temperature, and after it got warm it
would go all right, but while it was cold, when it was first ignited, it
would go out; but after leaving the match in there that would serve
as sort of a wick to sustain the combustion, and I was able to vul-
canize some patches with it.

Q. What occurred then, when was the construction changed from
ring construction to this pin construction?

A. I saw that it required more area, more room, for air to the
surface of the gasoline and it simply occurred to me that a number
of pins could be inserted in there which would leave it more open
and also form a uniform way of distributing heat over the surface
of the vulcanizer. I had the rings turned out and the pins put in.
This occurred, I think, within a day or two, after the first device
was made, which, as I remember, was the first week in September.
It was right after Labor Day; I came back from Akron after Labor
Day and, I think, it was within the next few days after Labor Day
that I did the experimenting.

Q. How many days after you first made the ring construction
was that the pin construction was made?

A. I believe the next day. This is the same original construction that was made, the first pin construction. (Indicating on device.) I used that by patching—first, when the rings were in it I used a couple of clamps on the edge of a table over the tube, and also after these pins were in it I still clamped it down by using a couple of clamps, clamping it on the edge of the table, and after experimenting a few times that way it was a little inconvenient to clamp it and I had—in fact, I made most of this myself, which was a little more convenient way of clamping the device on the tube. This was made within another day or so after the pins were put in.

This device—in fact, the first one gave very satisfactory results with the exception that the heat would not start into operation, but this device worked perfectly; I done several patches with this and showed a great number of people how it worked, and experimented with it. This would vulcanize very satisfactorily as it is.

I changed this somewhat: I cut the edge a little bit lower. Originally I think this was a little bit higher, the pins were about even.

44 The two Exhibits last referred to were thereupon offered in evidence and marked Complainant's Exhibits Nos. 6 and 7, said cup being Exhibit 6 and said clamp being Exhibit 7.

I believe that it was within the next two or three days that I told Mr. McCormish that I wanted him to come to Palestine, that wanted him to have some patterns made for this vulcanizer; that seemed to be a pretty good thing and I wanted to get it down in proper shape to make a commercial article out of it. He came to East Palestine and I made him a sketch from which I asked him to make a working drawing, and I gave him the dimensions and the general construction that I wanted to be carried out.

This is the sketch which I made (producing paper).

Said sketch (two sheets) was offered in evidence and marked "Complainant's Exhibit No. 8."

(Here follows diagram marked pages 45, 46, 47, and 48.)

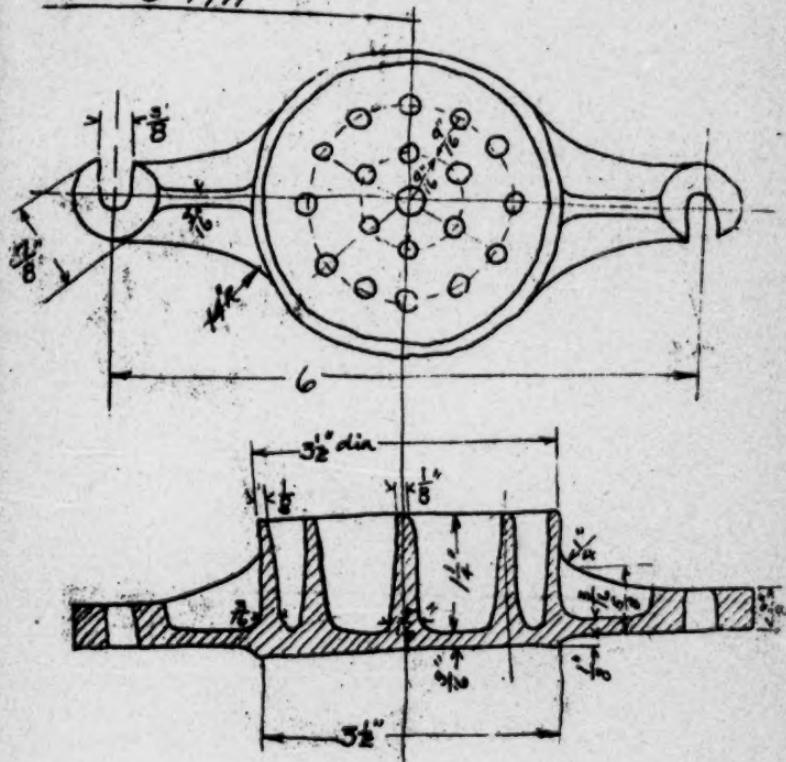
AM. Soc. Mech. Engineers

E

C. F. ADAMSON
CONSULTING ENGINEER
GENERAL ENGINEERING PRACTICE
HAMILTON BUILDINGS, AKRON, OHIO

CELL PHONE OVER

Oct 6-1911 —



36 "Complainant's Exhibit No. 1"
1/20/1914 instant

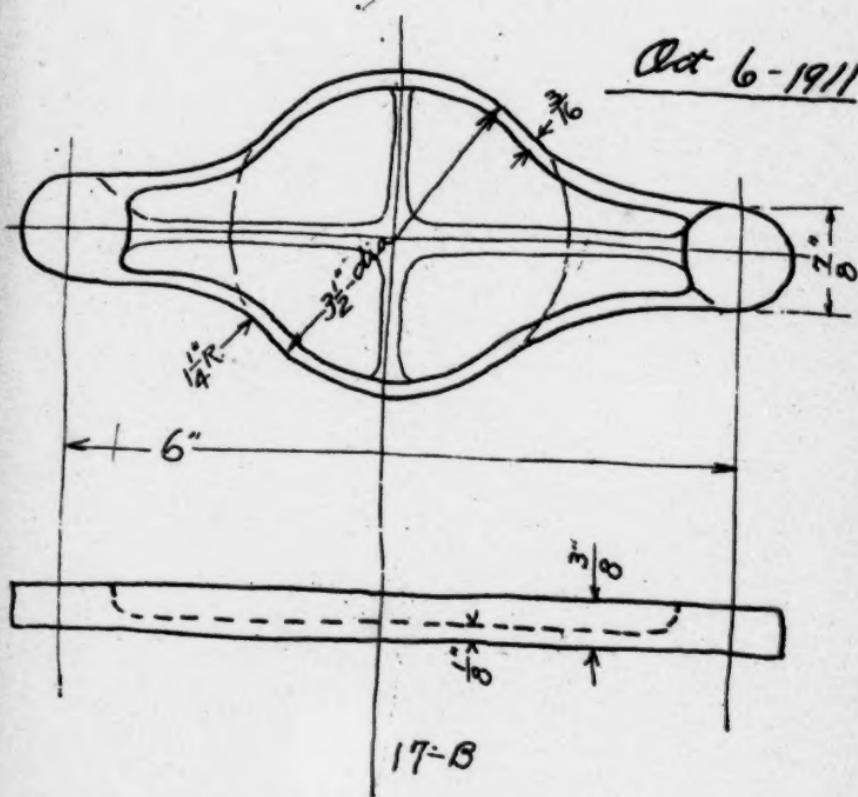
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This is the top view in this sketch (indicating), the plan view of the article, and the lower view is the sectional view of the center of the device. This sketch shows the top member of the vulcanizer and the second sketch shows the bottom plate which was used in connection with it. I indicated on this drawing the dimensions that I wanted Mr. McCormish to carry out in making the working drawing, and the pattern maker, and the idea was to reduce the original device into a commercial form, whereby there would be a couple of lugs for clamping the two members together. To make a neat design so as to look right and perform the work which was adapted to it, it was necessary for me to determine the distance from center to center of these lugs by finding the greatest width of tubes so they could take all size of tubes, from the smallest to the largest, which are ordinary and common tubes in use. Mr. McCormish took this sketch back with him and made a working drawing of it and had the pattern made of it. This pattern which have is the original, with a few changes which have been made in it.

Said pattern was thereupon offered in evidence and marked Complainant's Exhibit 9."

It was the Dietrick & Brunswick Pattern Shop at Akron who made the pattern, and it was made, as I remember, about the 12th or 11th, or 12th or 15th of October, 1911.

This pattern originally had the pins in it, which is still indicated by the holes in the bottom which have been filled up.

The first few castings from this were not perfect and it was necessary for the foundry to make the interior of the device by inserting a core in the hole, a dry sand core. There was a core box made for the interior and it was inserted into this cup. That necessitated the removal of the pins from this and the insertion of similar pins into the core box. The original pattern had openings in the lugs, reversed in relation to each other, and after the first few castings were made and I tried them, I found that this member would be dropped into the studs easier and put in position when clamping if the openings were on the same side, and I instructed Mr. McCormish to change the drawing and have the pattern maker—we were just then making new brass patterns for these pieces—and instructed the pattern maker to make the new brass patterns with the opening on the same side. It was changed and the brass patterns were made with the opening on the same side. There were several hundred made with the slots in opposite directions before the change. They were cast in Cleveland, the Ohio Foundry Company, Cleveland. That was during the last part of October and during the first part of November.

We first began to sell the vulcanizer about the latter part of October and all through November, and from then on. I presume that December 1st we had sold two or three thousand of them. I put a salesman on the road on December 1st; he started out and went east towards Buffalo and Rochester and on through to New York—December 1, 1911.

The success met with was such that when the trade would pur-

chase one-half dozen or a dozen of them to start with, I believe in most every instance after a week or two weeks we got orders for fifty or a hundred, and the next week or two we were selling those by the thousands to jobbers through the country.

Since we have placed this on the market we have sold in the neighborhood of 450,000.

In about February of 1912 we experienced trouble in the way of infringement, certain similar devices coming on the market; in fact, I had applied for a patent and it was at that time that I found that patent was becoming involved in an interference from the Patent Office, and every two or three weeks there would be an additional party added to the interference, and this patent had been allowed and I believe had commenced to issue and it was withdrawn from issue, and we were unfortunate in getting out and selling a few before the issue of the patent, which I always regretted, but from that time on there was similar articles coming on the market; it seemed almost every day I would find a new one which was being sold, and, well, along the middle of 1912, or during the summer or middle of the season—and along the middle of 1912, I presume there were 100 or 150 of infringements being sold. We originally established a price of \$3.50 on the article and that was dropped right down every month, and then they finally sold for fifty and seventy-five cents at retail.

I had no difficulty in getting the original price, said original jobber's price was \$2.00 on the device, which afterwards dropped to as low as twenty-five cents.

I believe that I applied for a patent the moment that I seen that this principle involved was something that seemed to me to be of value, and I think it was the next day or so after I tried this original device that I promptly went to Washington and had an application prepared for it.

51 Finally, when the interference closed, there were eleven parties, I believe, involved in it; nine or eleven, something like that and there was a great number of those finally dropped out, but one in particular stuck and we took testimony and carried it on until I think it was February or March 1913, when it had gone so far that we finally were able to bring the other party to appreciate our standing in the matter and it was finally dropped out and we got the patent issued on April 1, 1913.

A great deal of testimony was taken; it took several months.

Mr. Hills: In this connection I offer in evidence three separate certified copies of the records of the patent office, the same relating to these interferences and showing the parties involved and the manner in which they went out of the case. These records show that the three interferences were all involved in the same application of Adamson, being brought on different claims, but when the matter finally simmered down to Adamson versus Major, or Major versus Adamson, the three interferences were consolidated into one, there being but two parties left. The other parties, as the record will show, went out for failure to show Adamson—

Three certified copies of the proceedings referred to were marked "Complainant's Exhibit 10," "Complainant's Exhibit No. 11," and "Complainant's Exhibit No. 12," and are in the words and figures as follows, to-wit:

(*Stipulation.*)

(It is stipulated that the above Exhibits, Nos. 10, 11 and 12 need not be printed with the transcript of record. It is further stipulated that said Exhibits disclose that the application of the complainant, Adamson, which eventuated into the patent in suit, was under date June 25, 1912, declared by the Patent Office to be interference with the following applications:

Harry T. Hipwell, Pittsburgh, Pa.
Charles E. Marshall, Indianapolis, Ind.
Harry W. Comstock, Charlestown, W. Va.
Frank B. Mills, Grand Rapids, Mich.
Rudolph F. Muriset, Chicago, Ill.
James L. McVey, Dayton, Ohio.
William R. Major, East Palestine, Ohio;

that by a judgment rendered Sept. 24, 1912, all of said parties except William R. Major had judgment rendered against them for failure to overcome the filing date of Adamson's application, the said Adamson being the senior party to said interference,
52 and that on Mar. 5, 1913, a final decision in favor of Adamson and against Major was duly rendered by the Patent Office, to which the said Major consented by formally waiving his limit of appeal.)

During the season of 1912, since the interference, we, of course, retained all the clippings of infringements, and I have here a collection of the different vulcanizers which we considered infringements, which were sold and marketed from that time to this.

There are a couple of dozen here (indicating).

The clippings referred to by the witness are offered in evidence collectively as "Complainant's Exhibit No. 13," and are marked accordingly.

Stipulation.

(It is stipulated that the above Exhibit No. 13 be not printed in the transcript of record. It is further stipulated that said Exhibit discloses about thirty-five separate clippings, taken from various magazines published during the years 1912 and 1913, and disclosing advertisements of as many separate and distinct portable gasoline vulcanizers for tire tubes, all embodying, both structurally and functionally, the principle of operation disclosed in the patent in suit, said vulcanizers being offered for sale by various individuals, firms and corporations, widely scattered throughout the United States.)

Cross-examination:

Q. You do not mean for the Court to understand that these interferences in the patent office ever went to a hearing on actual contest, do you?

A. I did not state that they went to a hearing.

Q. You bought off your competitor, did you not?

A. I paid him a certain compensation which—

Q. \$20,000, was it not?

A. It was not exactly that, in that neighborhood.

Q. You gave him substantially \$20,000 to drop this contest and give you the patent?

A. About that sum was required to cause them to withdraw from the suit.

We first started to solicit business through the salesmen about December 1st, 1911. We first made the device about the 11th or 12th of October, 1911.

I was supposed to have spent a day each week with the McGraw Rubber Company. They had a salesman, I believe, at that time,

53 one man who traveled all over the United States. I could not say as to the name of the salesman who visited St. Louis.

They had a salesman at that time by the name of Mr. Howell, who covered territory in general. I knew Mr. Howell and talked with him from time to time during the fall and summer of 1911 on any occasion on which he might be at the factory. We always discussed matters pertaining to the manufacture of tires, prices, and so on.

After I paid this consideration of \$20,000, or thereabouts, they discontinued their contest and the patent issued to me.

Redirect examination:

At the time that I purchased or bought off the Major matter of interference, the McGraw Rubber Company were the people interested in it. They were the people whom I was spending certain time with.

Their entire testimony had been given and also ours was given; it was practically closed. The case was just at the point of being heard in the patent office and I understood there are three or four appeals that can be taken in a patent; in other words, I was sure they could hold the case up at least three years, and in view of that it was either having the patent issued promptly in order to try to establish a prestige in the trade whereby we would be able to gain something, and we were willing to pay a certain sum to cause them to let the patent issue. It was like paying for something that you owned, but at the same time it was the only thing I could see that could be done. It was either lose it or pay something to get them to withdraw so that we could get something out of it.

The new season was coming on and I had had considerable trouble through 1912. Things were practically shot to pieces and I saw that if it went on another year things would be practically worth-

less, and the only hope was to try to protect ourselves for the coming season because the cream of the business, you might say, had been done, the initial demand had been supplied.

Witness was asked to produce one of the vulcanizers now being made and sold by him in the open market and he produced same, which was offered in evidence and marked "Complainant's Exhibit No. 14."

This vulcanizer (Exhibit 14) has slots opening on the same side; there may be a slight difference in the weight of it, it may be somewhat heavier than the first one, but it is substantially the same thing.

54 DAVID C. GILLILAND, being sworn as a witness for Complainant, testified:

I am the David C. Gilliland who gave testimony in Indianapolis, Indiana, on behalf of the Shaler Company, in a suit on this patent brought by Mr. Adamson. I also gave testimony in this city in that suit; also in open court on behalf of the Shaler Company.

I was actively engaged in hunting witnesses during the entire time of taking testimony in Indianapolis. I was also so engaged in St. Louis. I paid my own expenses. I was paid absolutely not one cent by the Shaler Company. The Shaler Company is contributing absolutely not one cent in this suit.

I was produced at Milwaukee as witness in the Shaler suit because I refused by advice of counsel to answer certain questions at St. Louis. If I am not mistaken, Mr. Hills was the one that requested that I be there, and the court ruled that those questions should be answered and suggested that I should be there. At that time I was in Racine, Wisconsin, on business, in connection with my own case, not for Mr. Wheeler, but preparing my own defense.

FRANK E. VERNIA, a witness for Complainant, testified:

My name is Frank E. Vernia; age, 45; occupation, traveling agent for the Adamson Manufacturing Company; residence, Wellsville, Ohio.

I have been such traveling agent ever since January 15th, 1912. As agent of the Adamson Manufacturing Company I first carried a sample of the vulcanizer and made demonstrations, and sold them.

The vulcanizer on the table there (indicating Complainant's Exhibit No. 14) I can identify as substantially that vulcanizer.

I first crossed the State of Ohio into Indianapolis, Indiana, where I made my headquarters. I made sales in Indianapolis to a considerable extent, finally; at first, the sales were limited owing to the lack of knowledge of the merit of the article.

From Indianapolis I covered the State of Indiana up to the first of September.

The first particular demonstration was made in Thompson Hall at an Industrial Exhibit, Indianapolis, Ind., commencing February 12. These demonstrations were demanded on the part of the jobber,

who refused to buy the tool, saying that a demand would have to be made by the public. I then called on the individual consumer and sold a great number of them to the individual consumer, by demonstration. This created a demand, and the first order I sold to a jobber was to the Motor Accessory Company, that got twenty-five. Within less than three weeks they gave me an additional order for fifty. Then in a very short time they gave me an additional order for three hundred. Then later they gave the firm an order, through another salesman, for one thousand. That was shortly before the show, which, I think, occurred the latter part of April.

I never heard the suggestion as to a similar vulcanizer until I saw infringing devices. The first I saw was in the stock of the Guaranty Tire and Rubber Company, probably sixty days after I reached Indianapolis. It was made by the McGraw Tire & Rubber Company of East Palestine, Ohio. Before the year was up I saw them to the extent of probably a hundred, made by different people.

The competition had a reducing effect on the price; the price was reduced gradually until they were being sold as low as 75 cents at retail, and I understood as low as 27 cents by the manufacturer. When I started out our price to the jobber was \$2.00 a piece, less five per cent.

My idea of how many vulcanizers I have sold would naturally be hazy. I sold probably more than fifty thousand, and probably one hundred thousand, by my efforts.

Cross-examination:

I never went by any other name than Vernia that I have any knowledge of. I never called myself Dike. I certainly never represented myself as being Mr. A. L. Dike at the Liberty Foundry.

Mr. Mellow, of the Liberty Foundry, being present as witness for the defendant, was asked to stand up. The witness stated he did not recognize him. I would not say that I had seen that gentleman before. I would not say that I had not. I will say that when I was at the foundry I gave my own name.

- Q. What did you say was your business?
- A. I probably told him—
- Q. No, what did you tell him?
- A. I told him I was connected with Dike.
- Q. What else did you tell him?
- A. That is all that I can remember.
- Q. Are you connected with Dike?
- A. No, sir.
- Q. What reason had you for telling him a lie?

A. Telling him what, I beg your pardon?

- 56 Q. What reason had you for telling him that lie?
- A. I wished to gain some information which I had found was hard to gain if these people who manufactured infringements knew who I was and who I represented.

Q. You felt at liberty to lie to him in order to get certain information, did you?

A. Under the circumstances, he being an infringer, I took that liberty.

Mr. Hills here offered (pursuant to stipulation) certain testimony taken at Akron, Ohio, and gave a synopsis of the said testimony without reading same, to-wit, the depositions of Anthony J. Dietrick, Kenneth L. Douglas, P. J. Boylan and William E. McCormish.
Complainant rests.

Defendant's Testimony.

FREDERICK N. KILPATRICK, witness for defendant, testified:

My name is Frederick N. Kilpatrick. I have lived in St. Louis all my life. I am secretary of the South St. Louis Foundry, 7514 South Broadway; I have been connected with it since 1886.

Defendant's Exhibit No. 15 (shown to witness) is a casting, that is all I know; something similar to the kind that we made. It is known as a vulcanizer, but I did not know it at the time. That casting is so rough that it is pretty hard to tell, but I would judge it was made in sand; most all castings are made in sand. I can't tell whether it was made with or without a core; I would judge it was made with a core.

Witness here examined Defendant's Exhibit No. 10 and Exhibit No. 15 and said "They both look alike to me, about alike. They are about the same thing except this one is broken off and this one is not (indicating). One is more perfect than the other."

The first time I saw castings similar to those I saw them at our place back in 1911.

Q. Can you fix the time of the year 1911 that you first saw them?

A. I have a dray ticket to that effect here; I think I have the dray ticket here—I think in duplicate.

Said duplicate dray ticket was here produced and shown to witness.

That is a dray ticket that we issue on any delivery of castings from our plant. It says here "8/7/11, Call for D. C. Gilliland, 25 Vulcanizer casting 75 # in exchange for 1 set American batteries and spark plugs. No charge." It is in my handwriting.

Witness thereupon looked for and produced the original dray ticket from his letter file and stated that they were duplicates of one another. He identified the original as being in his own handwriting except the signature at the bottom "D. C. Gilliland." I don't believe I know Mr. Gilliland's signature, only I saw him sign that; it was signed at our office. This paper was made out on August 7, 1911.

The said original and duplicate were thereupon offered in evidence, said original marked "Defendant's Exhibit A," and the duplicate "Defendant's Exhibit B."

Said Defendant's Exhibit A is as follows:

"ST. LOUIS, Mo., 8/7/11.

Received from

South St. Louis Foundry
7516 to 7518 South Broadway
In Good Order

On Board Call
For D. C. Gilliland
Care of _____

Subject to Rules of Company's Bill of Lading

1st Class : 2nd Class : 3rd Class : 4th Class : 5th Class : 6th Class : Special

Marks.	No.	Articles.	Weight
	25	Vulcanizer Castings in exchange for 1 set American batteries & spark plugs. No charge.	75#
		(Signed) D. C. GILLILAND.	

Clear Receipt or None."

"Defendant's Exhibit B" is an exact carbon copy of said draw ticket, "Defendant's Exhibit A," and bears court file marks on the back thereof showing that it was offered in evidence in the Shale case in Wisconsin, and filed in the U. S. District Court, Eastern District of Wisconsin, on December 16, 1913.

I can't say that I saw all the twenty-five castings mentioned in this draw ticket. I saw some of them in the shop, but not all of them. They were carried up to the front of the shop about 58 300 feet before they got up to the office, outside of the office in front of the machine shop. They were left out there and they reported to me there were twenty-five castings and I made it out that way.

I saw some of these castings, similar to these, "Defendant's Exhibit its Nos. 10 and 15," at our place. I saw them there possibly two or three days before I made that ticket out, possibly the same day.

Said castings were thereupon offered in evidence and marked "Defendant's Exhibit 10" and "Defendant's Exhibit 15."

I don't know whether Mr. Gilliland 'phoned me or whether he came down there in person about this work that he has done. Quite frequently he had a little work done in the machine shop which we don't charge him for, but I don't know whether he called me over the 'phone, or whether he came in person. He offered me the batteries and spark plugs in exchange for the castings and I saw it was about an even exchange and I let him get them that way;

him buy them that way. Was an even exchange, there was absolutely no charge. He could get castings there tomorrow if he did not get too many of them, that we would not charge him for.

A transaction of this nature would not occasion any entry in our books—absolutely not. I don't think there would be an entry made on account of there being no charge; there ought not to be. I had not looked over the books for the purpose of seeing whether there was any entry made or not. As a matter of fact William Wurley (Defendant's witness) has charge of the books, and had charge of the books throughout the summer and fall of 1911, with my assistance.

We kept a time book in which we enter the names of the employees of the factory from time to time. When we employ a man there we enter his name on the time book, and when he quits we simply drop his name, or when he is discharged we drop his name.

We keep a time book, a fortnightly time book. It will show just the date of the last day when each man worked at the place.

There are at present here in the court room quite a few of the employees of our foundry. The names of such employees as I remember being with us about the year 1911, who are now present in the court room, are John Shanks, August Schaefer, Henry Laundman, Jacob Dillmann, Charles Haase, William Waldecker and Joseph Mirgain, or Murgane, I don't know how he pronounces it.

According to our time book the men whom I have named were employees of the foundry at that time.

The vulcanizer castings, Defendant's Exhibits 10 and 15, were the only castings that we made for Mr. Gilliland, so far as I can recollect. The only way I have of fixing the date independently from the dray ticket is from those batteries and spark plugs. I wanted to use them for a boat at the time which I was trying to buy and did not buy until two or three months later—a motor boat for my own use throughout the summer season, summer and fall from April to December. I finally bought it about October or November of that year, 1911. The batteries and spark plugs were used on father's boat in the meantime. (Referring to the batteries and spark plugs mentioned in dray ticket, "Defendant's Exhibit A") I received them from David C. Gilliland. I got them when he got the castings. I did not buy the motor boat until along about October or November; was trying to buy it all summer, but they wanted too much for it and I held off on it until I got it finally at my own price, along in October or November, when the season was about over.

According to my recollection, independently of this paper which dated, I would say that I possibly had a talk with him through the latter part of July or the first week in August, either over the telephone or in person, I can't recall that, but I remember the conversation. He wanted to have some castings made in exchange for some batteries, and he happened to show me the spark plugs when met him and I said I wanted some of those also.

These castings, "Defendant's Exhibit 10" and "Defendant's Exhibit 15," look similar to the ones we made. I would judge the castings were made about the first week in August.

Cross-examination:

Mr. Gilliland first broached the matter of the castings to me about the latter part of July or around the first week in August. I don't know exactly whether it was over the 'phone, or whether he came down in person. He did not show me anything that he wanted; he said they were light castings, small castings. He may have come down possibly right after. I told him he could have them made.

I don't remember seeing any pattern. The castings I saw a day or two before they were delivered to him were around what they call the Chipping Department. They had sand all over and were 60 not cleaned up. They looked similar to those castings (Defendant's Exhibits 10 and 15). It looked like one of those there, about that shape (indicating Defendant's Exhibits 10 and 15); so near like them that it might have been one of those, for all I know. There was a pile of them there, I don't know how many. I think he wanted fifty of them. I saw the pile laying around there, a lot of castings. I know they were castings there that came out of our foundry. So near as I know they were all delivered to Gilliland—the lot was gone after that. I did not see that lot delivered to Mr. Gilliland. They were brought up, I think, in two sacks in front of the shop so he could carry them easily. I can't say that I saw—that I saw those castings in the sacks, I do not say so. That was the first time we ever did any casting for Mr. Gilliland that I recall, and I don't think we made any since. He was entitled to free work to a small extent around the place. He was our foreman there about five years ago and he was severely burned and after he recovered he quit the foundry business, and I told him he could have a casting made now and then provided he did not run too heavy into the tonnage and we would make no charge. He asked me to give him that privilege and I said yes.

I did not see the pattern, but the castings after they were out John Shanks was our foreman. I don't know who made the castings. This casting was made possibly two or three days after Mr. Gilliland first talked about it. They were evidently finished on the 7th of August. They may have been cast before that. I can't say how many I saw. When I saw them they were in the rough state with sand on them.

I have the motor boat receipt in my pocket which I can show you (Producing receipt and examining it.) I bought the motor boat from Walter M. Loewenstein. The receipt is dated November 28, 1911. That was the date on which it was paid for; I bought the boat possibly a week before that.

At our foundry they issue a dray slip for practically ever-
ment. We copy from the dray slip to the shipping book; that is when we want to make a charge; when we don't want to make a charge, we don't enter it on the shipping book at all. If we get something we make out a dray slip if we get something in exchange for it or not. It is more of a check that we got that stuff, whatever it was.

In August 1911, I judge, the casting took place once a week, about the middle part of the week, Wednesday or Thursday. We were not shut down during the month of August 1911, I don't think so. W.

may have got a little slack and laid off some of the men for a week or two.

I am not prepared to say that those castings, "Defendant's Exhibits 10 and 15", are castings made in our place. I simply saw the castings that were delivered to Mr. Gilliland laying out in the foundry and know they were his castings. I don't think I picked any up; I don't know whether I did or not. I don't believe I saw the pattern at all. I don't take care of the patterns. My clerk gave me the information from which I made out the dray slip. He counted them and put them in and I naturally took his word and made out the dray slip. I gave Gilliland permission to have fifty made. I believe they made more than twenty-five and lost some of them, and refused to make any more of them, because we couldn't make them successfully in our shop. We cater to a heavy class of work more than we do to the light work.

Exhibit 14 looks similar to Defendant's [E-hibits] 10 and 15 but I cannot say that they are exactly the same. I would say that they were not of the same lot, because this casting (Exhibit 14) looks as though it was made with a core. It looks by the outside that it was made from a different kind of sand than that casting was made—this (Exhibit 15) was made with a coarser sand, and this (Exhibit 14) was made with a finer sand.

I don't think I ever made out a dray bill for any other work done for Mr. Gilliland. At the time I wrote the dray bill I don't know exactly what caused me to write that unless he suggested that they were vulcanizers; I did not know they were vulcanizers at that time. I don't believe I ever heard the word "vulcanizer" before that.

I don't know whether the castings made for Mr. Gilliland were made with a core box or not. I never saw the pattern. If I could recall seeing the pattern I could tell you whether it was made with a core box or not.

JOHN F. SHANKS, witness for Defendant, testified:

My name is John F. Shanks. I have lived in St. Louis for forty years; occupation, Molder. I am general foreman at the South St. Louis Foundry. I have been there for the last five years. I remember the Gilliland job. The job was brought to me about four o'clock one evening, and told me there was one hundred of the job. I made from twenty-five to thirty, something like that, and I did not make any more because the other jobs came in and there was not much money in this job and we put the job out—the shop is most put up for heavy work, and this casting is what you call light casting work, and we have no sand required for that kind of work. Heavy casting requires a coarse sand. This light casting requires a different grade, a finer grade of sand.

The job came in and I thought it was a complicated job, making this kind of stuff, so I thought it best to make them myself, which I did. They took them out the next day and took a half dozen or so in the office and I met Dave Gilliland and he took them off

me; I don't know what he done with them—he took them to the machine shop. I met Dave Gilliland and he took the castings. He is the man who gave me the pattern.

The castings lying on the table, "Defendant's Exhibit 10" and "Defendant's Exhibit 15" were made with green sand. I made them; these rough ones (indicating Defendant's Exhibit 10 and 15.) I couldn't just swear I made these castings, but castings like them. No molder in the world can go and identify his castings within three years without a mark on them. I have been a molder for the last twenty or twenty-two years.

There is no way in which these castings (Defendant's Exhibits 10 and 15) differ in any particular from the castings which we made; it requires the same kind of sand. That is made in rough sand, you can tell that by the looks of it (Indicating Exhibits 10 and 15.) They are defective; some of the pins are broke out. If they were perfect there should be nineteen pins in each. I couldn't tell you whether it was a metal pattern or a wooden pattern. Certainly I had a pattern; you can't make them without a pattern. David Gilliland brought me the pattern; handed it to me himself.

I made the castings of green sand like any other pattern. I poured them, cast them myself. I could not tell how many I made; there were some bad. The bad ones were not taken away by Mr. Gilliland. They were laid on the bench. He would not take any bad ones. I could not tell how many he took. I could not give the date when the castings were made. It was before Labor Day, that is all I could tell you. We had them before Labor Day, 1911, because in the year before that we were working on big work, you might say, all the way through. Labor Day was the first Monday in September. It was three or four weeks maybe a month before Labor Day.

Jacob Dillman, Joe Mirgain, Charley Haase, Schaefer and Laundman were working in the foundry at the time that this work was done.

These men are all present in the court room, subpoenaed as witnesses for Mr. Gilliland. These men had nothing to do with 63 this work. Schaefer is the man that took them down to the bench and that is where they were laid and cleaned up, and some were taken away without being cleaned. Schaefer took them down to the chipping bench to brush them up. The other men I have mentioned had nothing to do with handling them at all; all they knew is that the work was made there.

Cross-examination:

I made between twenty-five and thirty castings; over twenty-five, between twenty-five and thirty. I could't tell how many were sufficiently perfect to be taken away. I rapped a few. I made those and gave them to Dave Gilliland and he took them away. I was afraid to rap the rest because the iron was so hard. We did not do this kind of work. We took them down to the bench and brushed them up—I refused to rap them and I took a brush and brushed them, what they call a steel brush.

By rapping, I mean rapping a casting with a hammer to knock the sand off and you can break those teeth off by doing that if the iron is not right. The rest that Mr. Gilliland did not take away were on the chipping bench; I couldn't tell what become of them; they were cleaned and some were good and some were bad. Mr. Gilliland took a half dozen to start with. He came back and I don't know whether he took any more or not. They were gone. I don't know anything about them. He brought me the pattern, but I couldn't tell you whether it was metal or wood. You can make just as perfect a casting out of iron as you can out of wood.

In my judgment it was about three weeks before Labor Day, 1911.
Q. What has Labor Day, 1911, to do with it any more than Christmas?

A. That is the day we all had enjoyment, we went fishing that day.

Q. Did you make any castings?

A. I can remember the job was made just before that time, that was what made me to—

Q. I suppose you can remember it also because it was right after the 4th of July?

A. No, I don't think about that. Labor Day put me in mind of it. There is other work to come in. Let me tell you the reason I think this way: While this work was in here I took this job to the man in the office and I said, 'There is nothing in this job.' Other work came and I let it lay and did not fool with it. That is why I remember Labor Day. And then, we are not equipped for that kind of work, our foundry is put up for another kind of work.

Q. What I am trying to get at is what there is about the enjoyment of Labor Day that makes you think of these things.

A. I remember back that date.

Q. For three years you have carried in your mind the making of these little castings because it was Labor Day—

A. That is not the only way.

Q. Is there another job that Labor Day, 1911, recalls to you?

A. No, if I could get time to study I could study it up and tell you a whole lot of them.

Q. You can identify them by the holidays, can you?

A. Yes, sir.

At the same time we had this casting (Defendant's Exhibits 10 and 15) we made an under plate for Mr. Gilliland. We made one of the under plates for each of these castings.

WILLIAM WALDECKER, a witness for Defendant, testified:

I have lived in St. Louis all my life. I am not employed right now. I have been employed by the Mississippi River Commission. In 1911 the only work I done was at the South St. Louis Foundry. Mr. Shanks, Mr. Haase, Mr. Mirgain, Mr. Walsh and Mr. Dillman and Mr. Stevens were all employed there at the same time. There

may have been one or two others—Mr. Laundman and Mr. Schaefer were there.

It was either the latter part of June 1911 when I started working at the South St. Louis Foundry, or the first part of July, and quit in September; what day of September I couldn't say, but it was all around the latter part of September, I am not positive of that.

Q. I will ask you if during the time you were there did you see any castings similar to these castings, "Defendant's Exhibit 10" and "Defendant's Exhibit 15" around that foundry? Just look at them (handing castings to witness.)

A. Yes, sir. I saw casting good like this here, and this here bad one, and most of them were bad on top (meaning bottom)—they would be full of blow holes and again these pins would run the same as this, and some of these pins are broke. I saw around the shop, good and bad, and at least between twenty and thirty castings.

I couldn't swear positively that "Defendant's Exhibit 10" or "Defendant's Exhibit 15" is one of the real castings I saw down there, but just like it, I will say that. The casting was similar to that in the rough.

The sand is not fine in that foundry, it is awful rough. I saw some bad castings laying around there for at least four days; laying round the chipping bench—some bad ones. I guess the 65 good ones had been took up and sent away. This was at least a month or a month and a half before I quit the job.

Cross-examination:

I saw the castings around the chipping bench for about four days. They gather up the scrap; some of them had the pins knocked out and others had the lugs broke off, and others after being brushed there was a hollow space when cleaned out. They used to make remarks during dinner hour, seeing them laying around, and called them "waffle irons." There were at least a half dozen.

They gather up the scrap. It would be thrown on the cupola scaffold. They have the scrap pile there. I handled them, fooling and looking at them, and seeing what caused them to be bad. I don't remember that each one had a plate to go with it; I don't recall the plate.

CHARLES HAASE, witness for Defendant, testified:

I have lived in St. Louis all my life, forty-two years. I am a molder and have worked at the South St. Louis Foundry off and on for about twenty-eight years. The first part of August is when I left there. Before that I worked there, I guess, six or seven months. A few months after that I came back.

Q. Speaking of the time when you were there before you quit in August, did you see any Gilliland castings at the foundry?

A. I did not see the castings, but I seen the pattern.

Mr. Hills: Yesterday the examination of the witnesses was conducted in my opinion in a leading manner and I must protest against it.

The Court (to Mr. Carr): I think you had better ask him in a general way; you had better examine this witness without leading him.

Mr. Carr: I will not lead him, your Honor.

Before I quit in August I did not see the Gilliland castings, but seen the pattern. If I ain't mistaken it was a wooden one. I saw it at the South St. Louis Foundry in August 1911, Dave Gilliland had it. I have known him about six or seven years, or more. I worked for him at the South St. Louis Foundry. I saw Shanks hold the castings. I left before I seen any of the castings. I couldn't tell you exactly when I left the place; I don't know whether it was the second or third. After I left there I went, I believe, to Timmerman's, where I am working today, the St. Louis Corliss. Mr. Wurley kept the time book during the time I was there.

Cross-examination:

Q. Where did you work during 1912?

A. It is hard to tell.

Q. Hard to tell?

A. Yes, sir.

Q. Yet you remember all about this casting in 1911?

A. I just remember that business coming in the shop, yes.

Q. Do you remember any other castings in 1911?

A. It is pretty hard to tell, but I remember they built engines and stuff besides that.

Q. Who first talked to you about this casting, recently?

A. This casting here (indicating castings on table)?

Q. Yes.

A. Why, Dave Gilliland.

Q. How long ago?

A. In 1911, it was in August, I remember that well.

Q. Has he been talking to you about it this year?

A. Who, Gilliland?

Q. Yes.

A. No, the man subpoenaed me to come up.

Q. Did anybody talk to you before you were subpoenaed?

A. Why, no.

The Court:

Q. Have you talked to anybody since you were summoned here, did you talk to anybody about this matter?

A. No, I was asked and I told him, yes, I remember the thing. I couldn't tell how many or if they only made one or two; I don't know how many they made.

Mr. Hills:

Q. But nobody talked to you about this matter until you were called into court?

A. Oh, I was asked if I remember this.

Q. When?

A. I guess it was last week.

Q. By whom?

A. Sir?

Q. Who asked you?

A. Dave Gilliland asked me if I remembered them castings.

Q. Did he show you one?

A. No, sir.

Q. He just asked—

A. No, the first time he came I says 'If you show me the casting I can tell you if I ever seen them made there,' and he came the next night to my house and he showed me that—not the next
67 night—well, I believe this is one or that is one, I don't know (indicating 'Defendant's Exhibit 10' and 'Defendant's Exhibit 15'), and I told him, 'I remember them, Dave,' but I said 'The books will show I did not stay to see the finish.'

Q. The books will show what?

A. That I was not there when the castings came out, I did not stay long enough. You know, a molder, don't go around and see what other ones do.

Q. Then you were employed by the South St. Louis Foundry when Mr. Shanks was making these molds?

A. Exactly.

Q. You were not in the employ when the castings came out?

A. I might have been employed, but I never went around to look at them.

Q. Your recollection is that you left there the second or third day in August?

A. Not the first, the first part of August.

Q. The first part of August?

A. Yes, sir.

Q. What week in August?

A. I couldn't tell you.

Q. When did you go there that time, do you remember?

A. No, I couldn't tell you either.

Q. Did you ever see any other castings made for Mr. Gilliland?

A. Well, I don't know—I remember seeing Gilliland down a couple of times. I don't know if he had any castings—

Q. Did he show you any other patterns?

A. I am not sure, I don't remember. I remember this wood piece.

Q. You don't remember any others, though?

A. No.

Q. Your memory is very good about this being the first of August, 1911?

A. Around in August, yes, the first part of August.

Q. I mean, the first part of August you saw the pattern of these castings?

A. I seen that pattern fetched in."

"The Court:

- Q. Whom did you work for in 1911?
 A. I believe in 1911 for the St. Louis Corliss, Temmerman's.
 Q. How long were you there?
 A. Oh, quite a few months, until the jobs run out.
 Q. Do you know what months?
 A. Not exactly, Judge, no.

Mr. Hills:

- Q. You are perfectly certain you did not see that pattern when you were working there in December and January, instead of August?

A. No, I did not see that, I don't say I seen that pattern there, not I seen it in August.

- Q. When are you certain it was not the next time you worked there that you saw that pattern?

A. No, I never seen it there, not as I know of, not in December.

- Q. You have nothing to fix it but your recollection, that is all?

A. That is all.

- Q. Not another thing?

A. That is all, only that one thing, in August; I am pretty sure of that.

It was a wooden pattern that I saw, if I ain't mistaken; it was made rough. It was finished, but not painted. I don't know whether he had shellac on or not, but it was a rough pattern, I know, because when they drawed it out it would not draw tight.

The pattern was like "Defendant's Exhibits 10 and 15."

I believe I was there in December 1911 and January 1912. I did not see the core box. There was no core box used in preparing the molds that I know of. I saw Shanks working on the molds. I did not see them finished.

JOHN MIRGAIN, witness for Defendant, testified:

I am employed at the St. Louis Axle Company. I was employed at the South St. Louis Foundry for ten years. I stayed there until the middle of September, 1911, when a left. I remember Haase, Shanks, Jake Dillman, Laundman, Shaefer and Stecens being there at the same time. They were all there a month and a half before I quit.

Q. I will ask you to take and look at these two castings ('Defendant's Exhibit 10' and 'Defendant's Exhibit 15') and state whether you know anything about them; that is, whether you have ever seen those castings, or anything in connection with them, during the period when you were down there at the foundry?

A. I will not say I seen the very same castings, but I seen castings of the very same order. I don't know whether they are the very same castings or not. The date I first saw them was the latter part of July, or the first part of August, the first week in August 1911. I never seen the pattern. I did not see any operation connected

with the making of the castings. I seen the castings when they was laid out on the chipping bench. That was when they were cast and ready to be cleaned up—they were on the chipping bench and that is when I seen them. I saw twenty-five or thirty, maybe more or less. That is all I remember in regard to them castings.

On cross-examination the witness stated that the Sunday previous to his testifying he saw Mr. Gilliland who asked him if he remembered having some work done, and he stated that he did but did not remember what it was. That he did not remember the castings or what work it was until he saw the castings; that Gilliland did not show him the castings that Sunday morning but that he first saw them in court the day before he testified. That he does not remember Gilliland's having other work done and that he could not connect up any visit of Gilliland with his seeing these vulcanizers.

MAX STEVENS, witness for Defendant, testified:

I am not employed just now. I was employed off and on at the South St. Louis Foundry as a core maker for about thirteen years. I have seen castings down there that look similar to "Defendant's Exhibits 10 and 15," but I am no molder, you know, and I did not handle them. All I did was to handle the patterns and put them away; I put all the patterns away after they are cast. I have seen a pattern for the making of castings similar to these two Exhibits (Defendant's Exhibits 10 and 15). There was only one pattern seen there that went through my hands, that I remember of. It was a wooden pattern, as far as I can remember. When I saw the wooden pattern down there first it was in warm weather, I know, but I couldn't fix any date. It was about 1911, all right, I know, but I couldn't say whether June or July, I ain't sure. I seen the pattern lying on Shanks' floor and I seen the casting after it was cast. I couldn't tell how many castings were made. They were piled up there. I never had any handling of the castings or taking them out. There was a pile of them there, I couldn't say how many. They were right on the front end of the floor where they shake out and throw them in a pile ready to be taken away. The pattern was put away and when it was looked for it was broke up; there were some small pieces found of it, but what become of them pieces I couldn't say.

Cross-examination.

By Mr. Hills:

Q. Who looked for it (the pattern)?

A. I did.

Q. Who told you to?

A. Mr. Gilliland came down looking for his pattern and after the foreman of the shop had me hunt for it, look for it.

70 Q. When did you leave the employ of the South St. Louis Foundry?

- A. Along in the fall of 1912.
Q. The fall of 1912?
A. Yes, sir.
Q. Are you sure this was not the summer of 1912, that you saw
his?
A. Oh, no; I can remember that far.
Q. It was not 1910, either, was it?
A. No, it was not.
Q. So it must have been 1911?
A. I guess it was.
Q. You guess it was.
A. 1911; it was, I am almost sure it was 1911.
Q. You know it was warm weather, do you?
A. Yes, it was warm weather.
Q. Why, because you saw the castings, is that it?
A. No, because I could feel the heat.
Q. What did the heat have to do with the castings or the pattern
that you saw; might it not have been snowing when you saw it?
A. Because I seen it in warm weather.
Q. You can just remember that?
A. I can remember I seen it in warm weather, yes.

JACOB DILLMAN, witness for Defendant, testified:

I am an iron molder at the South St. Louis Foundry. I have
been employed there off and on about twenty years, I was there
during the year 1911.

Q. I will ask you to look at these two castings here ('Defendant's
Exhibit 10' and 'Defendant's Exhibit 15'), and state whether you
saw anything similar to those castings at the foundry?

A. I seen some similar to them, but I don't know whether them
is the ones or not.

Q. What did you say you saw?

A. I saw similar to these, I seen some made like them.

Q. You saw them made?

A. Yes, sir.

Q. Who made them?

A. Shanks, I believe, made them.

Q. Did you see him molding them?

A. No, I did not see him molding them.

Mr. Hills: If your Honor please, the question is very leading.
The Court (to Mr. Carr): Let him state all about it, without
leading him. (To the witness:)

Q. What did you see about them?

A. I seen them after they were made, I did not see him molding
them. I seen them after they were made. He was making
them. I did not see the castings when he made the molds.

He was molding them up, the sand. I couldn't say what
the time was. I couldn't swear to the year; it is quite a while back.
I guess it was in the fall sometime, or some time in the latter part
of the year.

I was subpoenaed to testify but nobody has talked to me in any way about this case. I am working now at the South St. Louis Foundry.

AUGUST SCHAEFFER witness for Defendant, testified:

I am employed as a laborer at the Furnace of the South St. Louis Foundry. I have been there eleven years. I have seen castings similar to the "Defendant's Exhibits 10 and 15" at the South St. Louis Foundry. I couldn't remember the day or the year. It is several years back, I know. I remember when they was made, but I couldn't tell you when. John Shanks made them, as I remember. I don't work in the sand at all, I just labor around there. I don't work in the shop, just out in the yard, but I came and wheeled these castings down to the chipping bench myself. They were put in the wheelbarrow and I wheeled them down. There was not over [thirty] or thirty-five, I don't think, probably forty. I never saw any more than just one lot of those castings made.

HENRY LAUNDMAN, witness for Defendant, testified:

I have been working at the South St. Louis Foundry about twelve years.

Q. I will ask you to look at those two castings laying alongside of you, 'Defendant's Exhibit 10' and 'Defendant's Exhibit 15' and please state whether you saw any similar castings down there at the foundry?

A. Yes, I seen some like this (indicating 'Defendant's Exhibit 10'), the same material; I don't know whether they are them or not.

Q. You saw some similar to 'Defendant's Exhibit 10': Please tell us what you saw.

A. I tell you I ain't sure how many, only when I seen [—] they was laying on the bench. The same material; I don't know whether they are them or not. I ain't sure how many, only when I seen they was laying on the bench. I did not see any one handle them. They were all piled up on the bench. It must have been anyhow two or pretty near three years ago, to my recollection. It was warm weather. Just the one lot was all I seen and I don't think I seen them all, for all I know.

72 Cross-examination.

By Mr. Hills:

Q. Are you prepared to swear that that was three years ago?

A. I said it was close to that, I did not say it was.

Q. It might have been two years ago?

A. It was over two years.

Q. You know it, do you?

A. I think I do.

Q. How do you know it? This is January, 1914.

A. Well, I know it is.

- Q. How many years ago was it, have you any way to fix the time
at you saw those castings on that bench.
A. I think it was over two years.
Q. You think it was?
A. Yes, sir.
Q. You don't know it?
A. Not right to the dot, I can't tell you.
Q. And you say it was warm weather?
A. Yes, sir.
Q. Why?
A. Because it was warm, and I run the cupola and melt the iron.
Q. Don't you do that in cold weather?
A. Yes, but you don't sweat as much as in warm weather.
Q. Did you run the iron for these castings.
A. Out of the cupola.
Q. For these castings?
A. Yes, and lots more.
Q. For every other casting?
A. Yes, for every one in the shop.
Q. That is your business?
A. Yes, sir.
Q. It is nothing unusual for you to run out iron?
A. No, that is my business—
Q. That is your business?
A. Yes, sir.
Q. There is nothing to connect it up—
A. I pour it out of another ladle and they carry it away.
Q. And you by accident saw them on the chipping bench?
A. Some of them, I did not say all of them.
Q. In passing, I suppose, as you went by there?
A. Yes.
Q. And you don't know when it was except it is your vague
collection that it is two years or so ago?
A. A little over two years, I know; it might be two and one-half
all I know.
Q. It might be less?
A. I don't know about the less part.
Q. It couldn't be less?
A. It is more than two years—it is 1914 now and that was in
1911.
Q. It was warm weather?
A. Yes, sir.
Q. You just remember it was warm weather?
A. Yes, sir.
Q. Has anybody been talking to you about this recently?
A. No, sir, I did not know nothing was coming up at all.
Q. Until when?
A. Until I came up here.
Q. When was that?
A. The other day, yesterday.
Q. Were you here yesterday?

- A. Yes, sir.
 Q. How did you happen to come?
 A. I got suspended.
 Q. When did you get that?
 A. The day before yesterday, Monday evening about four o'clock.
 Q. Up to that time nobody had spoken to you about it?
 A. No, sir, I did not know what I was coming up here for.

By the Court:

- Q. Why do you say it was warm weather instead of cold weather do you make the same kind of things all the year round?
 A. Certainly, but the weather is a good deal of difference.
 Q. Of course, but I am trying to find out why you say it was warm weather instead of cold weather they make these castings when you make castings all the year round.
 A. Cold weather is in a different part of the year, in the season.

WILLIAM C. WURLEY, witness for Defendant, testified:

I have been employed at the South St. Lona Foundry for the past three and a half years. I was there during the entire year of 1911. During the year 1911 I attended to most of the shipping in that building; I done most of the shipping and the time keeping. I have my time book for that period here. (Witness produces time book). In this book we take the days of the week because the cupola tender and the charger get an extra compensation for heating days; there is more labor attached to it. We enter the time ending fortnightly; the time for each man in the machine shop and in the foundry both. We keep the names of all the men that are working.

From examination of the time book, witness here testified that Shanks is in the book as foreman during 1911. The page I have here is ending August 12, 1911, and that page covers from the 1st to the 12th of August, two weeks ending August 12th.

74 The names of all that were in the foundry during the fortnightly period are: John Shanks, Charlie Haase, Joe Mergain, Jake Diliman, Henry Laundman, Max Stevens, John Brown (he was the driver), August Schaefer, William Waldecker, John Grady, Ed. Heckstein, Fred Walsh, and John Chew; the last mentioned is an apprentice. Shanks was the foundry foreman. Haase was a molder; Mergain a molder; Waldecker a moulder; Stevens a core maker; Diliman a molder; Laundman, cupola tender; Schaefer, cupola charger. That leaves John Grady and Ed. Heckstein; those two were both helpers. They are not in our employ now. They are both out of the city, I think.

Shanks had not missed a day since he had been there. He started to work for us the last time on the 27th of September, 1909. He had been working for us off and on, but he left us a few months before that and came back shortly after.

Haase started in on January 31, 1910, and worked up to August 4, 1911; that is the date of his last employment, and our book shows here that we only heat on the third, it being the day before

quit; run heat the day before he quit, as shown by a little check mark above the number of hours. That is shown by our time book. During 1912 Haase started in on April 21 and he worked the 1st and was off all week until the last four days of the two weeks; then he seems to have worked steady for a few days only and stopped again; he worked five hours and that ended his time on the second June, 1913.

After he quit on August 4th, 1911, his first employment begun the 22nd of September, 1912. September 14, 1911, was the last day both Mirgarn and Waldecker worked there. The two quit the same day. Business got slack on that day and they laid them off on the 14th of September, 1911. They never worked there since. The time book shows that we had heat at the foundry on Thursday the 3rd of August. The 10th of August we had the first heat there, and the 29th of July the first heat before.

I cannot recognize any castings. I have seen similar ones to "Defendant's Exhibits 10 and 15" at the foundry, but I couldn't tell whether that (indicating Defendant's Exhibit 15) came from our foundry or which foundry. This here casting I remember being planed that way (indicating Defendant's Exhibit 10); I took that casting and put it aside after seeing [iy] being planed. I remember this particular one unless it is—I cannot even say I remember this particular one, because another one might have been planed the same way, but I remember one casting being planed on the back.

I did not count them; I counted twenty-five between me and the helper, counted twenty-five to give to Mr. Gilliland. There might have been some in the scrap and I guess the molders made up to fifty. That was my first year at the foundry and I knew that it was during warm weather. They have a board over the cupola platform, but they usually take that down in summer account of the intense heat. In winter they close that up. I know this was done in the time they made them in front of the cupola. I remember that independently of my records. I might remember it was my first year at the foundry. I started on September 13, 1910, and I was not there quite a year. I have seen two dray tickets, "Defendant's Exhibit A and B" made out there when Mr. Gilliland signed the ticket and I seen them signed.

We brought the castings in from the foundry and I don't believe weighed them. We did not weigh the castings. Mr. Kilpatrick, I think, estimated the weight on it as seventy-five pounds. We brought them up through the machine shop; the foundry leads right into the machine shop and the office is North of the machine shop. We set the castings right outside of the office door and Mr. Gilliland took them. Mr. Gilliland was in the office while Mr. Kilpatrick was making out the ticket and I brought the number of castings in to them. I, myself, furnished the number, twenty-five, to Mr. Kilpatrick. There was only one lot that I could remember of that same pattern. The dray ticket had been in my possession all of this time, but Mr. Kilpatrick had access to the files.

I produced it the day they took my deposition; I couldn't say what date it was. I saw the date "8/7" written on there at the time.

Cross-examination:

When I counted out 25, the castings were out on the clipping bench in the foundry. I counted them myself with the man. We picked out the best ones of the lot of castings. Mr. Gilliland said we should pick as many as we would get out of the castings, and it just amounted to 25. It was Mr. Gilliland's request that I get 25. A few fingers were broken out in nearly all of them. Some were better than defendant's exhibits 10 and 15. None of them were much worse than those. We took them up through the machine shop, through the working shop to the machine shop, and up to the office door, and we laid them there at the office door. I went in the office and reported to Mr. Kilpatrick what I had. Mr. Gilliland was out in the foundry with me and after I got the castings he came into the office, a little before me. I went in and reported to Mr. Kilpatrick what I had. Then Mr. Kilpatrick made out the ticket this way (indicating defendant's exhibit A.)

76 The two sheets were in a pad, and there was a piece of carbon paper between. After the slip was made out, Mr. Gilliland signed them. I saw him sign. I gave testimony at the office of Carr & Carr in the case of Adamson vs. The Shaler Company, I would say some time ago, I not know the exact date.

Q. In regard to this same matter?

A. Yes, sir.

Q. At that time in X-Q 74, I asked you about the name David C. Gilliland, and you answered as follows:

'A. I was not there when he signed it. I was in the office, but I was not over there when he signed it.'

A. You asked me, 'Did you see him sign it,' and I said, 'Yes, I did.'

Q. X-Q 74 reads:

'I notice the name 'D. C. Gilliland' appears at the bottom: Did you see him sign that?

A. Well, I was not there when he signed it. I was in the office but I was not over there when he signed it.'

—. Did you say that at that time?

A. I don't remember saying that, if I said that.

Q. Are you prepared to deny you said that?

A. I am prepared to say I saw him sign this ticket.

Q. Then this testimony that you gave is not true?

A. I certainly made a mistake, or there is a mistake in it some way, because I saw this man sign the ticket. If this testimony shows that I said that I didn't sign it, it was not correct; if I said that, I surely made a mistake, and I do not remember saying it. That answer is not correct, because I remember telling you I did.

The Court: (To Mr. Hills) What case was that in which he was testifying?

Mr. Hills: In the case decided by Judge Geiger, on the same patent, against the Shaler Company, decided last month. The testi-

mony was taken the latter part of November—I can give you the date, about November 4th, I should say. It was taken out of court, your Honor, at the office of Carr & Carr.

Mr. James A. Carr: I would like to suggest, your Honor, that while that deposition was taken at our office, the office was used as a mere accommodation; we had nothing to do with that case.

The Court: It does not make any difference about where it was taken. The question is what was said.

77 Mr. Hills: Mr. Holcombe was of record in that case as appearing for Mr. Gilliland, and entered an objection on the record during the taking of that testimony and instructed Mr. Gilliland not to answer certain questions.

With respect to the casting which is planed, I couldn't state the date when that was done. It was shortly after the time they were made, I believe. I found this casting or a similar one to it, planed on the back that way, on the scrap pile outside of the machine shop. It was about seven months ago, I think. I brought it in the office and a few days later handed it to Mr. Gilliland. That was the summer of 1913. I don't know who claimed it. I think may be I found it by accident; I could not say positively. A few days afterwards Mr. Gilliland called me up and asked if I had any, and there is a rail in the front office and I had it on the railing. One of the boys had a tire at the foundry and we were going to see how it worked, to see the principle of the casting. This was positively before Mr. Gilliland called me up. I haven't seen them on the market before that, not that I know of. At the time I first brought those castings in for Mr. Gilliland I did not know anything about what the thing was, and he did not explain anything about it. I think there was also the plate that fits on the bottom; they were made but Mr. Gilliland did not get them at the time; I don't think he ever got the plates. The plates were made as our foundry foreman said, in the same snap; when they had room for three of them and could put another in between these castings, they made one of the plates. I can't say they made a plate for each one. I did not see any of the plates made. I only know about the castings that were made.

Q. There was not anything else there except these cups when you counted them off and brought them in, was there?

A. Well, I think there was the plate that fits on the bottom; they were made but Mr. Gilliland did not get them at the time; I don't think he ever got the plates.

Q. The plates were made?

A. The plates were made, as our foundry foreman said, in the same snap; when they had room for three of them and could put another in between these castings they made one of the plates.

Q. Made a plate for each one?

A. I can't say for each one.

Q. Did you see any of the plates made?

A. I did not; I know only about the castings that were made.

78 Q. All you know about the plates is what you have been told?

- A. What I have been told.
Q. When have you been told?
A. When Shanks testified yesterday.
Q. You have never heard of the plates for these devices before yesterday?
A. Yes, I have drilled them.
Q. Where?
A. Down at our foundry.
Q. You never made any other castings since then?
A. No, I have not.
Q. When did you drill them?
A. Castings that Mr. Gilliland brought in.
Q. After that time?
A. From the Liberty Foundry.
Q. From the Liberty Foundry?
A. Yes, sir.
Q. When was the first one of those brought in?
A. I couldn't tell you.
Q. Some time in 1912, was it?
A. No.
Q. Was it before 1912?
A. I couldn't state the date, I don't remember.
Q. Why did you say no when I said 1912?
A. Do you expect me to remember three years back?
Q. I don't want you to remember, I only expect—
A. I don't remember.
Q. Going back to the plates: You never saw the plates in the South St. Louis Foundry except those that were afterwards brought in by Mr. Gilliland?
A. There were just a couple brought in, two.
Q. From what foundry?
A. From the Liberty Foundry.
Q. But you did not see anything like plates at the time you counted out those twenty-five?
A. No.
Q. How did you acquire the information that there were plates who have you been talking to about plates since yesterday?
A. Not a bit; I only heard Mr. Shanks' testimony.
Q. And you have made up your mind there were plates because he said so?
A. No.
Q. Why do you say there were plates?
A. He said there might have been plates. I am not testifying there were plates made here because I said I did not see them.
Q. You said in answer to a question I asked if there was anything else there, that there was a plate—
A. You asked if I saw those plates, whether they were delivered—

(Previous questions and answers read to the witness.)

Mr. Hills:

Q. Are you now satisfied you started to talk about the plates?

79 A. I started talking about that, but I wanted you to understand my answer right. Did I not mention that Mr. Shanks gave the testimony; that he gave it yesterday? I said it in connection with that; I did not make it of my own free will.

Q. The first knowledge that you have of any plates in connection with these devices you got yesterday from the testimony of Mr. Shanks?

A. From the testimony of Shanks.

Q. You never saw any at the foundry and there were—

A. You are getting beyond me.

Q. Were there any plates on the bench with these devices when you picked out the twenty-five?

A. No, sir.

Q. And you never saw any in the foundry until Mr. Gilliland afterwards brought some over from the Liberty Foundry?

A. [T] think a couple, used for trial.

Q. And you never saw an under plate for one of those devices until the time that Mr. Gilliland brought them over from the Liberty Foundry?

A. No, I did not.

Q. And that was months afterwards, was it not?

A. No.

Q. Months after this incident?

A. I would not say how long it was afterwards; I cannot remember that.

Q. It was afterwards?

A. It was afterwards.

Q. It was some time afterwards?

A. I would not say how long afterward.

Q. If it was shown to you by record that those castings were received by Mr. Gilliland from the Liberty Foundry in the latter part of February, 1912, you could not deny that or you would not be prepared to deny it, would you?

A. I would not be prepared to answer you on it, I would not know the time; I don't remember.

Q. Did you hear anything said at the time that you picked out these castings, or was there any suggestion made by anybody, Mr. Gilliland or anybody else, about plates for these devices?

A. No, I don't remember.

Referring to defendant's exhibit A, Mr. Kilpatrick made a ticket out complete. We both, Mr. Kilpatrick and I, entered in the time book. The entry two weeks ending July 1, 1911, in Mr. Kilpatrick's handwriting, and two weeks ending July 15, 1911, is my own handwriting. We never made any other cup castings in the South St. Louis Foundry approximately the size of those exhibits, that I can remember. We do not handle small castings. Our business is mostly adapted to engine work, so if you know the work on engine work you might know the size of the castings. The smallest castings

we make are from seven pounds up. We do not handle anything less than $\frac{1}{2}$ inch metal. We cannot make them successfully. I knew at the time the exchange for the batteries and that, 80 because I wired the boat up myself. That was the old gentleman's boat, I think, Mr. R. J. Kilpatrick's. I done some electrical wiring on there and also fixed the ignition of the engine—I think it was with this material that we got from Gilliland. I am not sure of it. I used it later on for Mr. Kilpatrick's small launch. He got that the latter part of 1911; I could not say positively. Some of this material that he got from Gilliland I used on that boat, and I used it before on the "Bessie K," Mr. R. J. Kilpatrick's. I took it from the one to the other. I do not know when the delivery of the battery material and spark plug material took place. There was no exchange at the time the castings were delivered. The castings were delivered to Gilliland in a package of some sort; I do not know whether it was a sack; I do not remember whether it was a sack or any other package. They were brought to our front shop. I suppose he took them away; I left them out in the shop for him to take them away; I left them outside of the office door. The rest of them, the broken or imperfect ones, were all destroyed.

With respect to this dray slip, defendant's exhibit A, I recall distinctly that Mr. Kilpatrick dated that dray slip, dated it at the time when he wrote it. I think there is a hole in the top of that dray ticket where I had it on my desk. I have a little file on the side of my desk and I had it there previous—I always put the ticket on, and when I saw there was no charge I put it in the file. I usually put it on my desk before I enter in the shipping book. The duplicate is always handed to the customer. Before they were written they were in a tablet. Mr. Kilpatrick took the tablet, slipped the carbon sheet between the two, wrote and dated the bill, and then Mr. Gilliland signed it. I was there and saw him. Mr. Kilpatrick handed him the pad of paper and then he signed it. Mr. Kilpatrick tore off the two sheets. Mr. Gilliland took the carbon copy. Mr. Kilpatrick [pue] the other one on my desk and I put it on the file on the side of my desk. I think it was after Mr. Gilliland left that I stuck it on the file, I couldn't say.

Q. If that is the case, how do you account for the fact that both the original and duplicate are stabbed in exactly the same manner (handing papers to witness): do you find them to correspond?

A. Well, it is not such a difference that it couldn't have been done afterwards.

Q. It is apparently, though—

A. Apparently the same, but I am positive I did not put them on the rack at the same time.

Q. You are positive you did not put them both on the rack?

A. Yes, sir.

81 Mr. Hills (to the Court): Would your Honor care to look at the two and see the close similarity in the tear (handing papers to Court)?

The Witness: That paper might have been perforated before it left the pad; it might have been.

Q. Was it the habit to perforate the paper before it left the pad?

A. An accident might have caused it.

Q. It was no custom to perforate the paper?

A. No custom.

Q. Of course, accidents might have caused anything. I understand, however, you are perfectly certain that Mr. Gilliland took sway the carbon and the original was placed on the sticker, or on the temporary record?

A. I couldn't tell whether that perforation was by that same file, it might have been.

Q. I did not ask you that, I asked for the facts as you know them in regard to the papers. The papers speak for themselves.

A. Yes, sir.

Q. I hand you six dray slips taken from the box furnished by you and ask you to tell me the date on which they were made out?

A. 8/7/11, 8/7/11, 8/5/12—

Q. Remove that one—return that one and pick out those that are dated 8/7/11?

A. Just the [tthree] of them—the two of them, rather, just the two of them (handing the papers to counsel).

Q. Are these the two?

A. Those are the two.

Q. The two that are dated 8/7/11?

A. Yes, sir.

Q. How many pads did you have on that day for blanks for making out these slips?

A. You mean the number of those pads.

Q. Yes, how many, did you make them all out from the same pad; are you accustomed to have more than one pad working?

A. Mr. Kilpatrick had a pad on his desk and I had the duplicating machine—the shipment machine on my desk.

Q. You did?

A. Yes, sir.

Q. And he used a different pad from you?

A. He used the pad on his desk which was his custom to do, and you will find the tickets in the cabinet that will—

Q. I notice the two that you pick out as 8/7/11, are numbered 6573 and 6574; I notice there is no number on the one that Mr. Kilpatrick made out: How do you account for that?

A. We don't keep track of our tickets that way. We have a roll that these billings are put in a duplicating machine, they come in rolls. We have rolls in the office that are down to one thousand. We don't put them in rotation.

Q. You will notice that in other respect the 'Defendant's Exhibit A' differs from the two that you have identified as put out 8/7/11, particularly at the bottom: On the one the words 'clear receipt or zone' appears to the left, whereas on the other the same words appear in the center: Would these two slips be printed at different times?

A. It is a different edition altogether. Those other ones on the pad are the old [stationary] before they had the machine, and shortly before I came there they got this machine.

Q. And you still use both?

A. Well, we—

Q. Did Mr. Kilpatrick make out any others of these during this time, was he in the habit of making out dray slips at any time?

A. He did.

Q. Can you find some more samples in this cabinet? See if you can locate two or three.

(Witness produces two papers.)

Mr. Hills: We offer in evidence the two dray slips referred to by the witness, as 'Complainant's Exhibit 15'.

The dray slips last referred to were accordingly marked 'Complainant's Exhibit 15' and are in the words and figures as follows, to-wit:

Received From
South St. Louis Foundry Co.
7512-7514-7516-7518-South Broadway
In Good Order
6573 and large figure 1 in red ink.

St. Louis, Mo. 8/7/11.

On Board Call

For Burke & Joseph Cons. Co.

[Car-] of.....Subject to rules of Company's Bill of Lading

1st Class | 2nd Class | 3rd Class | 4th Class | 5th Class | 6th Class | Special

15298 Mfdg. by United Autographic Register Co.,
Chicago

No.	Articles	Weight
1	New nut fit to hydra— Jack plunger	
1	Jack " (theirs) returned	

WM. PRESS.

"Complnt's Exhibit No. 15" (2 sheets)

1/21/1914—M. J. Cook

Adamson vs. Gilliland

Clear receipt or none

Received From
 South St. Louis Foundry Co.
 7512-7514-7516-7518-South Broadway
 In Good Order
 6574 and large figure 1 in red ink.

St. Louis, Mo. 8/7/11.

On Board Call

For Burke & Joseph Cons. Co.

Care of Subject to rules of Company's Bill of Lading

1st Class | 2nd Class | 3rd Class | 4th Class | 5th Class | 6th Class | Special

15298 Mfdg. by United Autographic Register Co.,
 Chicago

No.	Articles	Weight
1	key (steel) forged.	WM. PRESS.
'Complnt's Exhibit No. 15" (2 sheets)		
1/21/1914—M. J. Cook		
Adamson vs. Gilliland		
Clear receipt or none		

Q. Did you say just now that you don't recall any other castings that Mr. Gilliland had made?

A. No, I can't recall any now.

Q. Do you recall testifying when you gave your former testimony in this matter in the suit of the Shaler Company, that Mr. Gilliland had small castings made for him by the foundry? I will read the deposition:

Q. What was the nature of the business which caused him to become known to you?

A. Well, his small items, the small castings that he had.

Q. Small castings that the foundry made for him, do you mean?

A. Small castings that the foundry made for him.

Is that correct?

A. He might have some small machine parts or something like that cast, but I don't know the nature of the castings and I don't remember him.

Q. Your impression when you gave that testimony was he had other small work?

A. He had other small work done in our shop.

Q. Your recollection is so good about August, 1911, that I would like to know how good it is as to some things that happened since, and I believe the Court would like to get your views on that also:

Is it not true that you saw Mr. Gilliland sometime or other after that when he brought you a casting from the Liberty Foundry?

A. Yes, I seen him then.

Q. That was over at your place?

A. Yes, sir.

Q. You did some work on that?

A. I drilled the little end.

Q. That is the incident that you cannot fix any date for at all?

A. I cannot fix a date on that.

Q. And yet you remember the incident thoroughly?

A. I remember doing it just because it was an occurrence, it was something unusual for me to leave the office.

Q. But there is no way that you can fix that with relation to the delivery to Mr. Gilliland of these castings, whether it was a month before or six months before?

A. Delivery of which castings?

Q. The castings supposed to have been delivered in August, 1911. I am trying to find out how long before or after the delivery of those castings was it that Mr. Gilliland brought you from the Liberty Foundry a casting with a base plate?

A. Yes, he did bring me the casting for the base plate and I drove the casting out; I can't remember how long after that was.

Q. It was after the delivery of the twenty-five castings, was it?

A. Yes, we done the castings; after he came to us he went from our foundry to the Liberty Foundry to have them made.

Q. That was the first time you had ever seen a base plate in connection with one of those vulcanizers?

A. Actually seeing, yes; I heard of them.

Q. Who told you about them?

A. Well, only with the—

Q. Is it not true that you never heard anything about base plates for those castings at the South St. Louis Foundry until you heard the testimony yesterday?

A. I have heard of the castings, but I did not see the castings until Mr. Gilliland brought that one.

Q. Who told you about that, whoever mentioned the base plates to you before Mr. Gilliland brought that one to you?

A. This casting, one of the boys were trying it, one of the boys seemed to have used it, and explained there were two little thumb screws together.

Q. When did the boy try it?

A. After we used it. He brought it up in front of me.

Q. He told you about trying it?

A. Yes, he told me about trying it.

Q. And he told you there was a base plate and screws: You are ready to swear to that positively?

A. He said there was a base plate to it.

85 Q. And screws, I believe you said just now?

A. Yes, and little thumb screws.

Q. He described how he used it?

A. He did not describe how he used it. He said they tried it, he wanted to try this one, I don't remember the boy it was.

Q. You don't remember the boy: Do you remember when it was?

A. Shortly after I picked the casting up in the shop, which was last year sometime.

Q. In 1913?

A. Yes, sir.

Q. That was after you had seen other castings in the stores, nickel-plated ones?

A. I did not see many of them.

Q. But they were on the market at that time?

A. Yes sir.

Q. And the boy fixed this up with a base plate and screws, but you did not see any other: We will come back to the original proposition: The first knowledge you ever had as to a base plate was when Mr. Gilliland brought these castings from the Liberty Foundry?

A. Yes, sir.

Q. Do you know where the battery and spark plugs given by Mr. Gilliland in exchange for these castings were delivered?

A. I couldn't tell you that, Mr. Kilpatrick handed me the package with the spark plug and batteries in it.

Q. You received them from Mr. Kilpatrick?

A. Mr. Fred Kilpatrick.

Q. You did not see Mr. Gilliland give them to him?

A. No, I didn't.

Q. Your knowledge as to that was gained from Mr. Kilpatrick, that they did come from Mr. Gilliland?

A. Yes, sir.

Q. You had no personal knowledge?

A. I had no personal knowledge of Mr. Kilpatrick receiving them.

Redirect examination:

I first saw the half dozen batteries and spark plug when Mr. Kilpatrick handed them to me. It was shortly after the date of Mr. Gilliland receiving the castings. Mr. Kilpatrick, Sr.'s boat was on the river, and he has electric lights he puts in his boat and I wired the lights so he would have the lights in the equipment as well as the ignition for the engines. He used those on the larger boat for quite a while. That is Mr. Kilpatrick, Sr. Later on, Mr. Kilpatrick has a receipt for the payment of the smaller boat—he bought that in November, if I remember, and we used them on that.

86 We run the engine in the shop to test the engine prior to taking the engine apart and repairing it. The older Mr. Kilpatrick's boat is a cabin launch, some 40 or 50 feet by 9 feet beam, used on the Mississippi River. They brought this large boat from the river as soon as the river was full of ice, and we brought them to the shop and run the small boat. I run the engine of the small boat myself with these batteries. That was after the river was full of ice.

Recross-examination:

The folio which I have produced containing the dray slips covers from December 19, 1910, to August 20, 1912. The folio is well filled with dray slips, though could not say how many slips there are in it without estimating. It includes all the dray slips made out dur-

ing the period marked on the folio, and I estimate that the number averaged eight a day from day to day.

HERMAN MILLER, a witness for defendant, testified:

I am Manager and Treasurer of the Southern Auto & Machinery Company. We manufacture private and pneumatic water systems for country homes; also have agencies on autos and do repair work on autos, carry an auto supply line, too, tires, etc. I have known David Gilliland since the fall of 1908.

Witness was here shown a paper on the stationery of the Southern Auto & Machinery Company, dated St. Louis, Mo., 8/8/11, and asked to look at the paper and state what stationery it was on.

A. That is just one of our dray tickets ordinarily used when delivering goods. This recalls the time when I loaned Mr. Gilliland a pipe vise and a pipe cutter. The ticket is made out in my own handwriting; the signature is Mr. Gilliland's. I remember the transaction, the date was August 8, 1911. I fixed the date from the ticket itself being made out on that date. Mr. Gilliland on the 7th came over with two sacks of castings and asked me if I would at the same time loan him a pipe vise and a pipe cutter inasmuch as we had pipe tools there on account of our water system work, and he had some pipe work to do at his home. I willingly said I would, and he asked me if I would mind hauling those next day, the two sacks, at the same time, inasmuch as the pipe vise was heavy. I consented to do that, but I told him I couldn't do it on the 7th, and on the following day he came back, because I did not know at that

time where Beethoven Street was, and delivered the tools
87 and the two sacks of castings. It was apparently on the 7th

Mr. Gilliland came to our place of business, the day previous to the day I took them out. It was around noon time, some time; I made the trip up at noon to get my dinner at the same time, if I recall correctly. He told me he brought them from the Kilpatrick foundry. They were lying on the floor by our garage, the front part of our building. He brought them into our garage; they were in two sacks. On the 8th he threw them in the car and we rode up to his house, and took them out. It was an Ohio touring car, an automobile. No one else was in the car besides Mr. Gilliland and myself. Our place of business was at 116 Robert Avenue. It is about three blocks from the South St. Louis foundry. I got a glimpse of the castings. I judge this to be one; it was similar to that (indicating defendant's Exhibit 10). I was somewhat inquisitive about it, and asked Mr. Gilliland what he had in the bag and asked him if it was junk. He lifted one out and said, "You might think it is junk, but it won't be junk before long." That is about the gist of the conversation. Nothing further passed as far as this is concerned.

Cross-examination:

I didn't take hold of the casting that Mr. Gilliland took out of the bag and showed me; just glanced at it as he raised it up. Later on I found out it was a vulcanizer and naturally, being of an in-

quiring mind, I was interested and I recall that was what Mr. Gilliland had at that time, but that day Mr. Gilliland had not told me what it was. I did not see any base plate, just this casting, that is all. This I can remember, that we drove out in the 1911 Demonstrator; that was our 1911 car; that was one of the first fore-door cars that came out; that car came out in February or March, 1911. We were driving that car from that time until the 1912 car came out. That helps me to fix it as 1911, but not August, and so far as the August date is concerned, the car adds nothing to my being able to corroborate it, that is, not as to the month, nor in the absence of the receipt could I be able to fix the date. The 1912 car came out about February of the following year. I remember it is the only time I drove to Mr. Gilliland's house and I made the trip with a view to bringing the tools, because the pipe vise was too heavy and at the same time had the castings in the sacks. Mr. Gilliland asked me to lend him a pipe vise and a wrench on the morning of the 7th. At the same time he brought the castings, he asked me what time I was going up town. It has been my custom always to come up and get lunch in town and do what other business I had and go back towards evening again. I gave the deposition substantially the same as this deposition I have just given in the matter of Adamson vs. the Shaler Company, about two months ago.

Redirect examination:

On that dray ticket, all of the following is in my handwriting: "August 8-11. Dave Gilliland 4208 Beethoven 1 pipe vise 1 pipe cutter loaned—to be ret'd in good order. Above returned Oct. 12/11 H. M." Mr. Gilliland's signature, after the first portion of it. "1 pipe vise 1 pipe cutter—loaned to be ret'd in good order," is signed by Mr. Gilliland. The notation "Above ret'd Oct. 12/11 H. M." is in my handwriting. This last notation was put on there on Oct. 12/11. When it was first made out in August, I carried it in the front part of an office file in which are the invoices, merely as a memorandum. Afterwards, in October, I still filed it in the same letter file. I have still kept it in the letter file all the way down to the present time.

Said dray ticket was thereupon offered in evidence and marked "Defendant's Exhibit H," and is as follows:

"ST. LOUIS, Mo., Aug. 8-'11.

Received in good order from Southern Auto & Machinery Co., 116-118 Robert Ave.

By.....

To be delivered to Dave Gilliland at 4208 Beethoven.

Marks.

Articles.

Weight.

1	Pipe Vise	
1	Pipe Cutter	
	Loaned—to be ret'd in good order	

(Signed)

D. C. GILLILAND.

Above ret'd Oct. 12/11.

H. M."

The following is stamped on the back thereof: "U. S. Dist. Court
East. Dist. of Wis. Filed Dec. 16, 1913, at — o'clock —. M. F. C.
Westfahl, Jr., Clerk."

Recross-examination:

The receipt 'Defendant's Exhibit 8' was offered by me in my testimony in the Shaler Company suit. My reason for keeping the receipt after the pipe wrench was returned is because I do not throw any records away. You will find my pockets packed with different records at the time. So far as this receipt is concerned, I apparently just happened to keep it.

CLARENCE L. SHEPHARD, a witness for defendant, testified:

I am a mechanic and have an auto repairing shop of my own, known as the C. L. Shephard Machine and Auto Repairing Company, at 3613 Gravois Avenue. In 1911, I was in the employ of the Franklin Auto Company, Syracuse, New York. They had at that time an office at 1306 Olive St., where I was working. Mr. Gilliland never came into the shop, that I know of. I myself personally did some work for Mr. Gilliland, in turning the bottoms off some castings he had. It was a round casting with ears on and pins on the inside, with a bottom plate to fit to it, to clamp to it. It was a casting like this, Defendant's Exhibit 10; similar in all respects, as near as I can see. Of course, I did not pay no particular attention to the casting, just merely taking off the bottom and smoothed them up for him. He brought in two; that is, he gave me two. I brought them in myself. When he gave me the castings I was at my residence, 3817 Fairview Avenue. They were given to me to turn the bottoms off and find out the approximate cost of getting them done by the thousand. It was somewhere between the middle of August and just before the V. P. Ball. I think that year the V. P. ball was about the 6th of October; I won't say for certain.

Cross-examination:

I know it was before the V. P. ball because after the V. P. ball I knew we get very busy in the shop and before that we are very dull. We had nothing to do there practically for two months in the shop but we would not have time to do it after that. This work had no connection with the Company; it was done for myself personally. It took me, say, five or ten minutes, along in there somewhere.

Q. I assume that the V. P. ball had something to do with your recollection, inasmuch as you have mentioned it.

A. Yes, I know it was before that; that was all.

Q. Why the V. P. Ball in connection with this?

A. Well I knew it was done before that because after the V. P. Ball I knew we get very busy in the shop and before that we are very dull. We had nothing to do there practically for two months in the shop, but we would not have time to do it after that.

90 Q. No time to turn off two castings?

A. No, not in the condition I was, because this work had no connection with the company; it was done for myself personally.

Q. How many hours did it take you to turn off those two castings?

A. Say five or ten minutes, along in there somewhere.

Q. You are quite sure, though, after the V. P. Ball you couldn't spare five or ten minutes?

A. No, I couldn't spare it because I had to do it on the company's time, and charge the man for the work, and I would not do that for anybody; even if I had the time I would not have done it.

If I remember right, I think there were bottom plates; I would not wear to it. I testified a month or so ago, the substance of the testimony just given in the Shaler suit. Later in 1912, I turned some more down in another place and gave some to my friends that Mr. Gilliland made me a present of. I made no mention in my testimony in the Shaler Company suit of any bottom plates. The ones that I did for Mr. Gilliland in 1912 were along in June or July and I am sure that these had bottom plates. I drilled the holes out and put bolts in of my own.

Q. Had you done any work during 1913 for Mr. Gilliland in that time?

A. No, sir.

Q. Then your testimony is not correct where you say: 'I faced some of them off for him last summer at my shop that I have [of] Lafayette Avenue.'

A. If I did, I have forgotten it. I turned them down, I turned down a number of them—I paid no attention, kept no track; it was a friendly matter. I don't keep track of them, don't try to remember.

Q. You were asked by Mr. Wheeler: 'Q. That was during what year?' And you answered, 'A. 1912.' He also gave gave me some of them that I turned down and gave to my friends that I was doing work for.'

I took it from that that you turned down some for him and turned down some for yourself?

A. Well, I may have turned some down for him and not remember. I turned some down and gave them to my friends, but paid no attention to the exact date, or what I did or the number, I did not, because it was not really anything that I cared about. I had no occasion to take any dates, or anything of the kind.

Q. So your memory as to the whole incident is none too clear, is that true?

91 A. No, it is absolutely not, only that I know I done this work.

Q. You did some work for him?

A. Yes, sir.

MAX HUHLE, a witness for defendant, testified:

I am an electric contractor, and was in that business in 1911. I have known David Gilliland about five years. I have seen one of these castings like Defendant's Exhibit 10. I bought one from him, Gilliland. I bought my machine in August 1911, and it happened in September, the middle of September, that I met him and he asked me which way I went with my machine, and I told him, "I

am going down to Grand Avenue." He said—I see he had a thing like this in the hand, and I asked him what he used that for and he said he used that for vulcanizers. I asked him if I can have one, if he make me one. I told him, "You have that for vulcanizing tires?" And he said "Yes," and I bought one from him. We were in my auto. We just went down from the street, from Gravois Avenue down the street. He only had one in the hand, that is all. He told me, "You have to screw this on a wooden block to put the gasoline in and screw it on a wooden block and put the tire underneath and screw it on both sides." That is the way I used it. I used it with a wooden block, screwed down to a wooden block, with a rubber tire underneath the casting. I put gasoline in it, the regular way. The first couple of [time-] I put so much in it made it so hot; then afterwards I found out, you know, that you can measure what you need. I guess I first [ysed] the vulcanizer in that way on the next day, because I wanted to see how the thing works. I suppose it was about the middle of September, say, because in August I bought my machine and that is why I [meet] him. I would not know the date.

Cross-examination:

I paid Mr. Gilliland a dollar for the vulcanizer. The one that Mr. Gilliland sold me did not have a metal bottom piece, but had a wooden block that it was screwed to. That is, Gilliland, did not have a wooden block but told me to use one. I could not find any receipt for the purchase of my auto, and the man I bought it from is dead. I went to Australia in 1909.

Q. Did you not, the last time you testified, state you were unable to say what month you went to Australia?

A. I know I went in December.

Q. When did you come back from Australia?

A. I was there a couple of months, I guess, about four or five months; something like that; I don't know exactly.

92 Q. You don't remember how long you stayed there?
A. No, I went in December.

Q. Do you remember when you came back?

A. I came back the same year.

Q. The same year; Do you remember the month?

A. This was 1909—I came back in 1910. In December I left, 1909.

Q. Where is your place of business now?

A. Grand Avenue and Wyoming.

Q. When did you move there?

A. I don't know exactly.

Q. You don't know when you moved: How long ago, do you know?

A. I am out in Grand Avenue now since, well, 1910.

Q. You are sure it was 1910?

A. Well, sure; I started to build up—it must be 1911, in the spring; that is right, 1911—

Q. In the spring of 1911, you moved there?

A. Yes, in the spring.

Q. You remember now?

A. Yes, exactly now, in March.

Q. March, 1911?

A. Yes, sir.

Q. When you testified before you couldn't remember?

A. Well, I remember now because it was the time I bought
some—

Q. When you testified before I said, 'How long have you been at
Grand Avenue and Wyoming?' You said 'Oh, I am there about,
let us see, about three years. I went to Australia and then I moved
to Grand Avenue.'

Q. When did you move [*the*] Grand Avenue?

A. I don't know, I can't remember the time when I opened the
business.

Q. Do you remember the month?

A. I couldn't remember the month, no. I know I came back in
the fall, you know; I can't know in what month." Your memory
has improved on those months?

A. I can show you that—I got it in March, that I came back in
March.

Q. Have you been talking to anybody about this matter since
you gave that testimony?

A. About what?

Q. About this auto and the testimony you gave?

A. I know I did not talk—

Q. You haven't seen Mr. Gilliland?

A. He comes in the store and bought some tires.

Q. Did you talk about the testimony you gave?

A. He don't talk about his business at all, only I had to
be there as witness.

Q. He did not ask you anything about what you told before, nor
talked about this?

A. No, sir.

Q. Did not tell you to look up about when you moved your store,
anything of that sort?

A. What I do?

Q. Did he not tell you to look up about when you moved your
store, the date?

A. No.

Q. But your memory is better now than it was the last time you
testified: Why did you say that you bought that auto in August,
1911?

A. I know I bought it in 1911.

Q. You just know it?

A. I know it, exactly.

Q. You just remember it; that is all. You have nothing else
to fix it by?

A. Well, I know I [*buy*] it in August, and then it was in Septem-
ber when I seen this casting.

Q. It couldn't have been as late as October, could it?

- A. No, it was September.
Q. What?
A. September, the middle of September.
Q. Where was your place of business when you bought this vanizer, as you say, in September?
A. On Grand Avenue, north Grand Avenue.
Q. Is Grand Avenue and Wyoming still your place of bu-
A. No.
Q. When did you move?
A. I don't know. I moved over from there—
Q. After you bought the auto?
A. A long time afterwards, yes.
Q. You don't remember when it was?
A. I don't know exactly."

JOHN SCHROER, a witness for defendant, testified:

I am employed at the Commercial Foundry, Primm & Alabama. I was employed at the Liberty Foundry. I started there when they first started to build that place in 1906. I worked there five different times. I worked four times up to August 16, 1912, and then worked before the holidays, 1913. I recall a similar casting to Defendant's Exhibit 10 at the Liberty Foundry while I was working there. In the latter part of the winter 1911, December 1911, or either the first part of January, 1912, Mr. Gilliland came down there one afternoon right after dinner. I was in the office at the time. I was foreman at the time. He came into the office and showed me a pattern and asked me questions about it. A small number of castings made off a pattern is hard to get a price on piecemeal work. So I gave this to our molder who was working at the time day work. The pattern was not exactly what I would say a first-class pattern. Of course it was a little rough, made in rough sand, you could see that, but it was filed and ground up to be used as a pattern. All patterns coming in, no matter how rough or smooth, are considered a pattern when coming into a foundry to be made. We had considerable trouble with it and we, for several weeks, up to two to three weeks, we experimented on this job without any success. When we got to making the thing we tried to make it with a core, which we did. We tried one and it came out pretty nice, not to say a first-class casting; I would not call it a first-class casting, because it came out to convince Mr. Gilliland that it should be made with a core instead of making it in green sand. This casting, (Defendant's Exhibit 10) is a very rough casting, to my knowledge; it has been made from green sand. The casting is very rough and it could not be used only by pointing it up for pattern purposes. It was a casting with a defect. This casting, (Defendant's Exhibit 14) is a casting which I will say is not a real fine casting, but it is a way better casting than Defendant's Exhibit 10. This casting, Exhibit 10, I know personally was not made at our foundry, because we never got any castings off this pattern that was anywhere near that shape. We never got any that turned out defective.

In fact, the biggest part of them were not poured. Defendant

Exhibit 10 is made in a mold, Defendant's Exhibit 15 is made the same way. Only this one, (Defendant's Exhibit 14) is made with a core, and this one is not; it is made in green sand. Exhibit 15, to my knowledge, is similar to this No. 10. It was not made at our foundry. The core casting, Defendant's Exhibit 14, I could not say whether it was made at our foundry, but it is similar to the castings made at our foundry. It may be one of the castings made at the Liberty Foundry. We never got any castings off this pattern Mr. Gilliland fetched down until we used this core, which was a couple of weeks, probably two or three weeks. He fetched in a metal pattern, gray iron, cast iron. It was made out of rough sand. I left the Liberty Foundry in August, 1912.

Cross-examination:

The witness stated that complainant's Exhibit 14 and Defendant's Exhibit 10 looked alike and that they differed from each other only that one had been cast in coarse sand and the other in fine sand. The witness also stated that a separate base plate was brought in with the casting but that it had no screws in it.

Q. DAVID C. GILLILAND, Defendant, a witness in his own behalf, testified:

Q. Mr. Gilliland, I wish you would just tell your own story in regard to your connection with the vulcanizer in this case.

A. It was a principle that we had used a good many years ago in the bicycle business in vulcanizing bicycle tires. It was used around in Indianapolis by practically every man that was ever connected with the bicycle industry. During the year of 1911, I was in partnership with a man on Olive Street, under the name of the Auto Clearing House. In this partnership affair of mine we were handling a little stuff out there, such as vulcanizing auto patches for auto tubes, and different things, soapstone and graphite combinations, and selling it to the trade. I had shown these patches to a man on Olive Street by the name of Huber, and was trying to sell them to him, told him they could be vulcanized or put on cold. He kind of laughed at the idea and said he was from Missouri and I would have to show him, which I proceeded to do. I went down to a hardware store on Vandeventer Avenue, to the Lauman-Fattman Hardware Company, and bought a small ladle and a screw clamp; took this to his store on Olive Street and demonstrated to him with that that this vulcanizing could be done by taking this small ladle—first, preparing the tube for vulcanizing by thoroughly washing with gasoline, and treated with sand paper or emery paper; putting this patch on the tube and putting the ladle on both of them; clamping the ladle upon that with a screw clamp, putting the gasoline in and igniting it. It took about ten or fifteen minutes for the amount of gasoline to burn out that I put in there, and when I took the ladle off the tube the patch was vulcanized. He laughed at it and he said, "Why on earth can we not sell those vulcanizers to fellows that are using these patches?" I told him we might be able to do that, but

then everybody could go to a hardware store and buy a ladle and clamp, and he says, "Put it in salable condition," and he suggested that we take this ladle and put some ears on the side of it and some pins in the center. We talked the thing over. I went home that night and made a little sketch of about what I thought I could do and I proceeded to make a pattern. I did not have all of the necessary tools for making this pattern and I called up the Boehl Hardware Company the next day and asked them if they had an extension bit that they could lend me, that I wanted to bore about a three inch hole, and they let me have this extension bit. I worked on the pattern, I should judge it was ten days before I had it completed; I had other things I was doing; I worked on it in the evening and 96 sometimes during the day, and I got this thing about as complete as I thought I could get it, and I went to the foundry, to Kilpatrick's foundry. First, I 'phoned down to Kilpatrick and asked him if he would make some castings for me and he said he would. The next day or day after that, I went down there to the foundry and Mr. Kilpatrick was not there, but apparently he had spoken to the foreman of the foundry and told him I was going to bring some patterns down. I took the pattern back into the foundry myself and gave it to the foreman. The castings were made between that time and about the 6th or 7th of August; I couldn't say just as to the time that they were cast, but it was on the 7th day of August that I got my castings. After getting these castings—

Q. What year?

A. In 1911, August, 1911. After getting these castings from them, I carried them over to the Southern Auto & Machinery Company, 116 Robert Avenue, which was a block or a block and a half away from Kilpatrick's foundry, and asked Mr. Miller to haul them up to my house. We got them. The castings were pretty rough, full of sand, and some pins were broken out, but I picked out the best ones that I thought were all right, those that would do, and we hauled them up to my house. I went right on uptown with Mr. Miller at that time and went up to the shop where I had been employed and where I was working as a partner in the Auto Clearing House, and got some raw rubber and some cement and some of these self-vulcanizing patches, and came back to the house that afternoon and finished up one of these vulcanizers: that is, I cleaned out the sand and smoothed it up the best I could with a file, and the next morning after daylight I went down in the cellar to try it out.

By the Court:

Q. You did what?

A. Went down in my basement, my cellar, to try this vulcanizer out.. My wife is afraid of gasoline, she won't even allow coal oil in the house if she can possibly avoid it. So to keep her from knowing anything about this burning gasoline down there I opened up my furnace door so as to draw the fumes up in the chimney. I vulcanized this tire with that and got a comparatively good job. Of course, the vulcanizing was rough and the patch was rough when it came off. I took this vulcanizer up on Olive Street to Mr. Huber

and showed it to him, and he said, "Hello, where did you get the pile of junk?" I said, "It looks like junk all right." I said, "It is pretty rough casting; you can't do much with it, but it is a good idea," and he tried it out, but he had roasted me so unmercifully about the looks of it—some of the pins not all there and partly broken out—it kind of disgusted me, myself. I did not do much more with this vulcanizer until along in September. I was opening up negotiations with the Banner Rubber Company for a position as salesman. I understood there was going to be an opening and the business I was in was not very profitable and I was trying to get out of it, so I had called up the Banner Company and talked to Dr. Barrett, The President of the Company, and he said to come up to see him, that there might be an opening, that they were figuring on making some changes. I went up there and he told me they were going to do certain things; some stockholders were going to get out and new stockholders in, and they expected to get plenty of money very shortly and they were going to take the business. While he did not hire me, he practically told me when the change was made he would see I was taken care of for a position. Negotiations were not opened up after that for sixty days or more, but on my way up to see Dr. Barrett, I rode with Mr. Huhle in a small car of his, a car he called the Hupmobile, and he asked me what that thing was I had in my hand. He was an electrician interested in any electrical contraption he might find, and I told him it was a vulcanizer. He wanted to know how it worked. He says, "Can't you work it with electricity?" I said, "No, pour gasoline in and light it." He was very much interested in it and he said he would like to have that vulcanizer; he just bought his car and had some tubes, and he could make his repairs with it. He did not know anything about repairing tubes only with a cold patch, so I sold him this vulcanizer for one dollar. I did not do anything more with the vulcanizer at that time, with the exception of getting Mr. Shephard to machine two of them off on the surface so I could continue my experiments with them. Those two that were machined off by Mr. Shephard were somewhere in the latter part of September, because I told him—

Q. 1911?

A. 1911, yes. Because I told him that I might be able to make something out of it if I could get the things in salable shape, and he finished them up. He turned off the bottoms and ground off the sides in such shape that it looked pretty decent after being finished on an emery wheel, and I took these home and tried them out, vulcanized with them, and, of course, being perfectly smooth on the bottom they gave much better results. But I was in such financial condition that I couldn't go ahead and have good patterns made. I did not have any money, I was practically "broke." I had not drawn but about \$350.00 for my year's work up to that time, that is, from the 15th of March until the latter part of September, so 98 that I was badly in debt, and did not have any money to throw away. So I dropped the thing and did not pay much more attention to it until some time in December when this Koochook

Rubber Company had moved from Olive Street to an address down on Jefferson Avenue, and I went down there and took two of those vulcanizers that were ground up. He said, "They look better." I said, "Yes, but there is a whole lot of work in grinding those up." At that time he said, "Well, go ahead and make some more of them." He said, "Spring will be coming along pretty soon and we can sell them."

About the 15th of September I commenced to open up negotiations again with the Banner Rubber Company. They had incorporated then under the name of the Stearns Rubber Company.

Q. The 15th of September?

A. The 15th of December. About that time they had incorporated and made their arrangements; at least, that is the time they made up the negotiations with me again about taking this position. I did not have much time to do any "monkeying" with them. Huber called me up two or three times. Finally, just—I should judge just before the first of the year, I went down to Kilpatrick's foundry and told them I would like to get some more of those made, but I would like to have them made a little smooth. He said, "I won't monkey with that stuff any more. It is cold weather and the sand will stick to the pattern and you cannot do anything with it." I said, "Where is the pattern?" He said, "It is around here some place," and he called this fellow, Stevens, the core maker, and told Stevens to hunt this pattern for me. Stevens looked around the pile of patterns on the floor and on what they called the foundry desk, and all we were able to find of it was part of one side of this pattern. I was kind of up against it; I would like to have had some of those castings made and he said, "Dave, why don't you take them over to the Liberty foundry? Those people have fine sand and they are fixed for making that light casting." I had not known before that there was such a place as the Liberty Foundry. I went over to the Liberty Foundry after that some time in January. I had taken down one of these old castings that I had made originally and I tried to finish them up at home the best I could, and found the metal was pretty hard to file, that I would have to anneal this metal before I could do much with it. I took the vulcanized and put it in my furnace and kept it in there and kept it red hot for some little time, and then took it out of there and buried it in the ashes. It had softened it some. After it cooled, I put it back into

the furnace again and this time when I put it in the ashes it
99 was in fairly good shape, it was in workable condition. I

then got some sulphuric acid to eat the scale off that iron by making a solution of sulphuric acid and water and painted this casting with it to clean it up thoroughly and get all of the sand and everything out of it that I could. I took this casting over to the Liberty Foundry and talked to the foreman of the foundry. I got there just at noon; none of the proprietors were there. The foreman of the foundry told me I would have to see Mr. Mellow, that he was the man that was in charge and would take care of all that work, and I waited around there until Mr. Mellow came and he said, yes, he thought he could fix me up some castings. So I left

the pattern there, and possibly a week after that, or three or four days, I called them up and they told me I had better—

The Court:

Q. What pattern?

A. This iron pattern I had filed up out of the iron casting. I went down to the Liberty Foundry and they told me that that casting was all right for a pattern but they were having trouble with it because the iron, when they went to pour it they couldn't pour it hard enough to force those pegs full of metal without washing the green sand core. This green sand core, of course, showed up on the inside and by forcing the metal against it the force of the metal would wash this green sand away. He said, "If we pour it slow it has a tendency to flash over and the metal will fill up in those pins and cold-shot or chill until such a time that when the metal flows over the top of it those pins will all fall off. They are cold-shot and they won't stick, they won't go together." He said, "Why don't you make a core box for it?" I said, "I don't think it is necessary." I said "Kilpatrick made some over there with all those pins perfect and there is no reason you can't. I would like you to go ahead and see if you can't make them." He said, "We have spent one-half day's time on this stuff now, experimenting with it. If you are willing to pay us for our time experimenting, I will go ahead and make them, but you have to put up some money first." Well, money I did not have. I told him that I expected to get hold of some money in the next day or two. If this thing went all right I expected to sell a good many of them, so I took the—he handed me the pattern and told me what he thought he could do with it. He said, "I will show you: I will take this thing and make a core. I will ram a core up in there and I will pour that with a core and show you that I can get a perfect casting." I said, "Go ahead and do that." It might have been a week after that before I was down there again because I was then employed by the Stearns Rubber Company: I had signed up 100 with them to go to work for them and was at their store on

Locust Street. It was fully a week, I guess, before I went down the next time, and I had called them up before going down and they said, yes, to come down, they would show me the casting all right. So I went down there and they showed me that everything was in fine shape, that if I would make them with the core that I could get their casting. They said they would not lose one in a hundred. So I told him I would go ahead and make the core. I took this casting and knocked the pins out of it and made a wooden plug and set down on the inside of the casting for a core print, and then made a core box. I took it down to the foundry and they said, yes, they thought that would be all right; that they would go ahead; that they might have to make a few minor changes in the core box if it did not just exactly fit the print, or something of that kind. So they went ahead and made two or three of these castings for me and showed me they were all right, they could be made, and made the core from this core box that I had furnished

them. About that time the Stearns Rubber Company got into financial difficulties and this organization that had started out on January 1st—about the 25th of January, we all got a notice that the Stearns Rubber Company was a thing of the past, that they would have to wind up their business, that the Banner Rubber Company, the manufacturing end of it, could not supply them with the goods, that they would have to discontinue. I stayed there at the store and invoiced the stock and got things in shape and stayed there until about the 10th of February. I did not do any more with the vulcanizer until after that time. Then I showed Mr. Huber some of these castings I had and Huber said, "Yes, that looks better." He said, "You had better make me some of them." In the meantime, in January, Huber called me up and he said, "Dave, somebody swiped your patent." I said, "What's that?" He says, "Your vulcanizer." I said, "Get out." He says, "Sure, somebody swiped it." I said, "Why, who is it?" He says, "There is a fellow here in town selling a vulcanizer exactly like yours." I said, "Get out." He says, "It is a fact." I said, "Where are they?" He says, "I have two of them down here at the store," and I went down to the store and saw this vulcanizer. Well, it was pretty near a picture of mine; of course, it was smooth. It was nickel-plated up and slick, something nice. There was some class to it. He said he could buy it pretty near as cheap as the rough castings from me. It had a plate on the bottom of it and it was fixed up in good shape. I told him I guessed we would have to go ahead with it and see what we could do. But I was still employed then by this Stearns Rubber Company. After the 101 Company had gone out of existence and the affairs had been wound up I went back to Huber and told him if he thought we could sell any of them I would go ahead and make them. So sometime in the latter part of February I got my first bunch of castings from the Liberty Foundry that I finished up for Mr. Huber.

(Continuing) This ladle here, Defendant's Exhibit No. 2, is the original ladle that was used fifteen years ago around Indianapolis, and was left in my father's tool box when my brother and I closed up a bicycle business there in 1897, and was taken home and put in my father's shed. I have used that ladle to vulcanize with during the time I was in the bicycle business in Indianapolis. I used the ladle for vulcanizing by cleaning off a tube or casing, whatever we happened to want to repair with it, and clamping it down, putting the tube on a block of wood, or on the work bench, took a screw clamp and clamping on top of the tire, first, of course, preparing the tire for vulcanizing by putting on some raw cement, or vulcanizing cement, and raw rubber, then clamping this ladle down on the tube or casing with an ordinary clamp and pouring in the quantity of gasoline, depending on how deep the patch was and from experience we had found out that if it was a pretty thick patch on the casing we would have to use a little more gasoline and keep a little longer heat on. On a tube it did not have to burn as long because the rubber was thinner than we did our patching with. You put this clamp in, pour the gasoline in and light it.

This clamp (Defendant's Exhibit 8) is what is known as a C-clamp, or an ordinary cabinet maker's clamp. It gets its name "C-clamp" from being shaped like a letter "C". It has a screw turned or cut in the head, and a screw is inserted in there forming a clamp. By turning the screw in you can tighten it or loosen it on whatever work you may be working on. In the vulcanizing operation the screw extends all the way to the bottom of the ladle.

Said ladle was here offered in evidence marked "Defendant's Exhibit 2" and said C-clamp was also offered in evidence marked "Defendant's Exhibit 8."

In using this ladle here anyone could have gone to a hardware store and bought a ladle of this kind and vulcanized with it. There was no secret about it, anyone could have done it. It was done by hundreds of people years ago and there was no secret whatever about it. This vulcanizer here (Defendant's Exhibit 10) was nothing more or less than the evolution of this ladle to be put in salable form. A man could go to a hardware store and buy that ladle for ten cents and a C-clamp on that order for ten cents, and have a vulcanizer. To put it in shape to sell as a vulcanizer you would have to have something to put out that had some salable point. This idea here (indicating Defendant's Exhibit 10) was developed not as a proposition of invention but as a selling point to give something to talk about by telling how these pins radiated the heat to the bottom of the vulcanizer. When it comes down to the actual facts those pins do not cut any ice. They did not benefit the vulcanizer in any way, shape or form, as a heat conductor.

Q. What function did you expect those pins to perform?

A. We expected to tell the poor, unsuspecting public that they conducted the heat to the bottom of the ladle, or the bottom of the vulcanizer, and it was sold and is sold yet, and the people generally believe that those pins have to be in there to conduct the heat.

The Court:

Q. Which is a false statement?

A. Which is a false statement.

Mr. Carr:

Q. In regard to the use of the clamp: Explain the difference in the use of the pins from the use of the clamp here.

A. The clamp would act the same as the pins if that clamp had any bearing on conducting heat to the bottom of the ladle, or distributing heat to the bottom of the ladle; it would be the same thing as these pins, these pins here do the same thing.

Q. I will ask you if there is any substantial difference between the vulcanizing, the actual results obtained with the ladle, and the vulcanizing with this vulcanizer in suit here? *here?*

A. None whatsoever.

Q. Do they both operate satisfactorily?

A. Both of them will operate satisfactorily. I can do just as good job of vulcanizing with this ladle as I can with that vulcanizer.

Q. How about the general public?

A. The general public could do the same thing. It has got to the point now where there is no secret in vulcanizing. Take any ten year old boy that has been around an automobile shop and he can vulcanize. There is no secret in the process of vulcanizing, and has not been since Goodyear's days.

Witness here identified Defendant's Exhibit 13 as a core box that he made in January or February of 1912, and took at that time to the Liberty Foundry. That core box, Defendant's Exhibit 13, was thereupon offered in evidence.

I borrowed an extension bit from the Boehl Hardware Company for boring a 3-inch hole through a piece of 2 x 4 to make the pattern that this original South St. Louis Foundry casting was made from. In making the pattern, I, in the first place, took a piece of 2 x 4 and clamped it in my vise on my work bench and I drilled a hole through the piece of 2 x 4 within about 3/16 inch of going all the way through the commonly called 2 x 4, which is in reality 3 3/4 by 1 1/4. The screw point of the bit passes through the back, but the cutting edges did not go all the way through the 2 x 4. I had a block of wood about an inch thick and about four or five inches in diameter that I put on my lathe as a base plate and used this block hole through the bottom of the block as a center, through the center of my lathe, and fastened this base plate on to the lathe by the screw that holds the chuck, and fastened this block on to the base plate by a screw through the center and some brads through the bottom on to the plate. I had taken this 2 x 4 that I had bored the hole in and cut the corners off of it so as to leave it as near round as I could, and put the piece in the lathe, put a piece of a file that I had ground off for the lathe tool into the tool holder, and started my lathe and turned this down very nearly to the size. Then I took a file and smoothed it off on the outside the best I could, and took emery paper or sand paper and smoothed both the inside and the outside. Then in making the bottom plate here and the pieces that act as pins, my little girl had a small doll's high chair that had rounds in it about the size of a lead pencil, a little larger, possibly, and I cut them off and put them in this lathe and brought them down to this taper with a file. I drilled holes in the block of wood that I put on the bottom here and put these pins in this block of wood, glued them in, also glued the bottom and bradded it on to the outside piece, and cut out these lugs with my knife and chisel and bradded them on to the piece by putting them on before I put the bottom plate on there so I could tack it from the inside, and they were glued on there in place. I then shellac-ed the pattern, let it dry and it was ready for the foundry. The wood pattern was made in the latter part of July, 1911. I procured the bit from the Boehl Hardware Company. Mr. William Baier was the man who had told me I could have it and sent it to my house. It was brought out by Harry Spoeneman. Mr. Spoeneman is my brother-in-law and was working for the Boehl Hardware Company. I should judge I had the extension bit about ten days, possibly two weeks. I took

it back to the hardware store myself. I returned it to Mr. Baier of the Boehl Hardware Company.

104 The only record made of the loan of the bit was a memorandum. I could not say as to the date I returned it, I know that I returned it myself.

The bill head dated September 1, 1911, on the stationery of the Auto Clearing House and marked "Defendant's Exhibit 9", is a monthly statement and was issued by the Auto Clearing house to the Koochook Rubber Company September 1, 1911, calling for goods that was sold them on August 26, 1911, billed as merchandise, \$18.50. That merchandise was self-vulcanizing patches that I had sold to the Koochook Rubber Company on August 26, 1911. At the time I was trying to sell the Koochook Rubber Company these patches by calling them a self-vulcanizing patch and telling them they could be vulcanized or put on cold, that the heat from the tire itself would vulcanize them eventually. He said, "Well, you sell those things to a man and tell him they can be vulcanized. What does he know about vulcanizing? It ain't everybody that has a vulcanizer. You have to pay ten or fifteen or twenty dollars for a vulcanizer that is of any account." I said, "Get out, a man can get one for twenty cents," and that is what started the argument about this vulcanizer, about how it could be made how it could be sold. It was fully a month before the sale of those vulcanizing patches that I had this discussion with this man.

Defendant's counsel thereupon offered said paper in evidence and same was marked "Defendant's Exhibit 9."

Cross-Examination:

When I made this pattern for the original vulcanizer there was no base plate at that time. The first base plate that I made was either in the latter part of December or the first part of January, 1912. I made the lugs on the vulcanizer to screw it down to a board, which we did originally.

Q. You made them with oppositely disposed openings in order to screw down to a board?

A. We put them down so a man could take it off. That thing gets hot, there being no handle on there. When that thing was screwed down to a board if that thing had the slots in any other position we would have had to let it on there until it got cool enough to handle, or you would have to take these screws clear out of your board before you could have lifted it off your work. In this way you could unscrew it slightly, take the pressure off it and twist it around and it would slip off.

Q. It occurred to you at that time to put the strengthening fins in?

A. It did.

Q. All that was done without any experiment of any sort, this complete device was produced?

105 A. I am enough of a mechanic to know that when you get any metal hot that you have not the strength you have in cold metal, and you have got to brace any metal.

Q. You went to all this trouble to put these pins in although you knew they were perfectly worthless?

A. Yes, sir.

Q. Even though you had trouble with the Kilpatrick foundry solely on account of the pins; then went to the Liberty Foundry and had trouble there, and finally had to make a core box, all to put something in the device that was perfectly worthless?

A. That would make it salable, and if we put this on the market without any pins in today it would not be six months until everybody would have the same thing.

Q. You have testified that fifteen years ago you used a ladle and a C-clamp?

A. Yes, sir.

Q. How many people in Indianapolis used it?

A. Well, we were able to produce about twenty different people there that had used it, had used it practically themselves. You were there when this evidence was taken and you ought to know.

Q. The Court wishes to know this, I don't. When did you stop using that ladle in Indianapolis?

A. When I quit the bicycle business, in 1898.

Q. Did you ever see it used between 1898 and 1911, a period of thirteen years?

A. I never heard of it being used because I had no occasion to hear of it being used.

Q. You recognize that automobiles had been quite a factor in the country in 1911, had they not?

A. Yes, sir.

Q. And have been for a number of years?

A. Yes, sir.

Q. And that there was a demand on the market for a cheap vulcanizer to do the cheapest vulcanizing that was on the market, in the summer of 1911?

A. Well, I can't say. I believe the cheapest so far on the market was one called the National Steam Vulcanizer, or some such name.

Q. What did it retail at, do you know?

A. I think it retailed for \$7.50.

Q. After you put these vulcanizers out they met with a ready sale, did they not?

A. They apparently met with a very ready sale.

Q. Such a ready sale that you were prepared to go to considerable expense to attempt to break down the patent?

A. Certainly.

106 Q. In 1911, no such article was on the market notwithstanding the great knowledge that everybody had, as you say, as to this ladle and C-clamp experiment? You knew of nothing of that sort on the market; you knew of nobody that had such a thing as that in 1911?

A. How is that?

Q. You knew of nobody that had such a thing as that in 1911?
A. No, I had no occasion to know of anyone using—I was not connected with the vulcanizing industry at that time. I took one of these castings and fixed it up and carried it over and it was used as a pattern. There was a base plate, and I think I used an iron pattern for it, if I am not mistaken. Mr. Kilpatrick gave me some iron plates gratis, in either December or January when I had gone down there (to the South St. Louis Foundry) looking for my wood pattern. I had another pattern with me for the base plate at that time. The foreman of the foundry made the base plates.

Q. But the foreman of the foundry testified yesterday that he made the base plates for you originally?

A. He might have testified to that; I have no control over that.

Q. Was that correct?

A. No, it is not correct.

Q. It is not correct; You are quite sure these originals were not made in December or January down at Kilpatrick's are you?

A. I am absolutely sure.

Q. Is it not a fact that the originals were made there, the first one in December—

A. You may know better.

The Court: (To the witness) Answer the question.

A. No, they were not made.

Mr. Hills:

Q. No base plates were originally—

A. No, sir, there was not.

Q. Notwithstanding the testimony of the foreman, who did all the work on them, that there were base plates made, you say there were no base plates?

A. Yes, because he made the base plates afterwards.

Q. Then you say he has confused the two incidents?

A. Undoubtedly. When I got the castings from Mr. Kilpatrick I received a duplicate dray slip and took it away with me and preserved it two years. That dray ticket has been in the possession of my attorney for a year. I put it in his hands just about a year ago. I was consulting him about other patent matters and told him that I had made these castings, made these vulcanizers, and thought

I was entitled to a patent on it, and he said, "We will go 107 into the matter," and then I commenced getting my evidence together at that time. I got that dray slip at the time it was made out with the castings. I took it home and put it in a file I had at home with a number of other receipted bills. I am not positive whether I saw Mr. Kilpatrick make out the slip. I was in the office and couldn't say that I seen him make it out because he was at his desk. I was outside at the rail. Mr. Kilpatrick handed me the slip. I undoubtedly saw the original of the slip, because I signed it. I signed it and took the duplicate.

Q. Can you give any explanation of the fact that the original

and duplicate are both perforated in the same manner? You will find they register exactly.

A. I would not be a bit surprised but what that has been done since they have been in the possession of the Court, so far as that goes.

Q. Are you aware of the fact that the young man from Kilpatrick's foundry testified yesterday that he filed the original on a sticker right after receiving it?

A. I am not positive of that, no; I was not there, right there in the room.

Q. The only explanation is it might have been done in the court room?

A. It might have been done, yes.

I got the batteries mentioned on the slip from the salesman employed by the American Carbon & Battery Company. Mr. Kilpatrick had offered to make the castings for nothing, and he said he was buying a boat, and I said I would fix him up with batteries and spark plugs. All told, I think there were three spark plugs. I know that at different times I have given Mr. Kilpatrick, I expect, as many as a half dozen spark plugs. The first time I saw a complete vulcanizer with a base plate was some time in January, 1912. That was the one that Mr. Huber called to my attention. It was in Mr. Huber's possession. He had it down at Locust and Jefferson Avenue. At that time I had only made a few of my vulcanizer and had not taken any steps at all to manufacture them because I was not financially able to do it. That one lot was all that I had made, and the base plates, which I had made somewhere either in the latter part of December or the first part of January. The first castings that I had made at the Liberty Foundry I had no iron plates for. There was no pattern brought down there to the Liberty Foundry for any iron plates of the first ones that were made and delivered to me. That delivery was made the 28th of February—somewhere in that neighborhood. I believe the name of the first

complete vulcanizer that I saw at Mr. Huber's was "The Little 108 Giant." I have filed a patent application involving this vulcanizer. I have put it into the hands of my attorney and they are handling my patent matters; I couldn't say what steps have been taken.

Mr. James A. Carr: I can state to your Honor that the purpose of the application by Mr. Gilliland was to interfere with Mr. Adamson, and that we have copies of the claims of Mr. Adamson and expect sooner or later to get an interference with Mr. Adamson for the purpose of trying out the very question that we are trying here.

Witness: I consulted my attorneys on this matter about a year ago. Mr. Huber suggested the pins and the lugs. Mr. Huber, while he suggested those pins in there, he did not suggest how the pins or [lugs] should be put on there, or anything of the kind. He said, "Why would not a pin in there or pins in there act the same as a clamp?" I certainly give Mr. Huber credit for suggesting the idea of pins, and my testimony all the way through has been to that effect. I was called in open court in Milwaukee to testify in the suit

against the Shaler Company. After being examined by complainant's counsel, Judge Geiger asked some questions.

Mr. Hills: I will offer in evidence a certified copy of the testimony given by this witness in court in Milwaukee.

Mr. James A. Carr: It has nothing to do with this case any more than any other testimony. It is immaterial.

The Court: I will allow it in.

To which ruling of the Court the defendant, by his counsel, then and there, at the time, duly excepted.

Mr. T. Percy Carr: The witness is entitled to have it called before his attention properly if he is to be impeached. The specific question should be read to him and he should be asked about it. That is the only fair way of bringing it to the attention of the witness.

Mr. Hills: I have raised no question of impeachment on this testimony. I simply offer it.

The Court: It will not do any harm.

Said certified copy of the testimony was accordingly marked "Complainant's Exhibit No. 17", and is as follows, to-wit:

"UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, F. C. Westfahl, Jr., Clerk of the District Court of the United States of American for the Eastern District of Wisconsin,
do hereby certify that I have compared the annexed with its
Original now in file and of record in my office, and that the
same is a true and correct copy of Testimony of David C. Gilliland,
given in open Court in the case of Cecil F. Adamson vs. Clarence A.
Shaler, et al.

In Testimony Whereof, I have hereunto set my hand, and duly affixed the seal of the said Court, at the city of Milwaukee, in said district, this 13th day of January in the year of our Lord, one thousand nine hundred and fourteen and of the Independence of the United States, the 138th.

[SEAL.] (Signed) F. C. WESTFAHL, Jr., Clerk.

United States District Court, Eastern District of Wisconsin.

CECIL F. ADAMSON
vs.
CLARENCE A. SHALER et al.

On hearing before Honorable Ferdinand A. Geiger, Judge. December 13, 1913, Testimony of David C. Gilliland as follows:

DAVID C. GILLILAND, being first duly sworn, on oath testified as follows:

Mr. Wheeler: Does you Honor wish me to examine the witness on direct?

Court (to Mr. Hills): Do you desire to conduct your cross-examination now, Mr. Hills?

Mr. Hills: I would like to ask Mr. Wheeler if he desires to examine him any further.

Court (to Mr. Wheeler): You may examine him in chief further, if you desire.

Mr. Wheeler: I do not desire to examine him in chief any farther, unless the witness being here we cannot use the deposition.

The Court: The deposition is in evidence so far as the examination in chief is concerned. Counsel may cross-examine.

Mr. Hills: I will ask first two or three questions that the witness refused to answer:

110 Cross-examination.

By Mr. Hills:

Q. You are the D. C. Gilliland who gave testimony at Indianapolis and St. Louis?

A. I am.

Q. You are also the D. C. Gilliland against whom suit has been entered by C. F. Adamson?

A. I am.

Q. In the matter of the same patent involved in this matter?

A. I am.

Q. While giving your testimony in St. Louis you refused to answer the following question, which is repeated:

'Q. Could you give any idea how many you have sold all together.'

Said question referring to the number of vulcanizers sold by you up to the present time, and since you began the sale in February or March, 1912?

Mr. Wheeler: I wish to enter a formal objection to that question on the ground that it is immaterial.

Objection overruled.

Exception.

A. You want to know how many vulcanizers I have made and sold?

Court:

Q. Can you give any idea how many you have sold?

A. About 20,000.

Q. The second question that you refused to answer in giving that testimony was as follows:

Q. Were you present one day last week in the office of Carpenter, Evans and Couch of Indianapolis when a proposition toward a compromise of this suit was made by Mr. Wheeler?

A. I was.

Q. Did you participate in that discussion?

A. I believe not.

Q. Was there any mention made that you were to be benefited by any compromise that was to be effected?

A. There was.

Q. Is it not true that you were to receive a license as one of the terms of the proposed compromise under the patent in suit?

A. The proposition, as I have it, was made in this way: Mr. Wheeler and my attorney, Mr. Holcombe, offered to lay their cards on the table and show you what evidence they would produce, and to not put the testimony into court; that if they did, any one in the future might be able to get this evidence and use it in any case that they might have; and it was advisable to stop the suit before it went further, and we were perfectly willing to lay down our cards to show what we had; and that no one but the Shaler Company and Adamson Company and myself would be benefited; and that we were perfectly willing not to knock your patent out, but would take a license; but absolutely refused to pay one penny for it.

Q. I repeat the question: Were you to receive a license as a part of that settlement?

A. As far as the license part is concerned, I was.

Q. What answer was made to the proposition?

A. That you hadn't gone in deep enough into the proposition yourself, and that you were not in a position to offer anything; that you wanted to see more of the evidence before you would consent to anything of that kind.

Q. Did I not say to you and the parties present that I understood from Mr. Adamson that if he was not the inventor of the subject matter of that patent that he would wash his hands of the whole affair?

(Question read.)

Mr. Hills: I will amend that by saying: In substance.

A. You said something to that effect, but not at that time. That remark of yours was made in the lobby of the Claypool Hotel in Indianapolis.

Q. You are quite sure it was not made at the time?

A. I am absolutely sure. If you made it over there I was not there when you made that remark; but I was when you made it at the Claypool Hotel.

Q. At any rate, the proposition was declined, was it?

A. It was.

Mr. Hills: There are some other questions that I wish to ask this witness, and I would like to know whether I am at liberty to ask him now, or whether it would be necessary to ask his recall.

Court: You may cross-examine now to the extent you desire.

Q. When did you reach Milwaukee?

A. Last night at about five o'clock.

Q. You communicated with and got in touch with Mr. Wheeler?

A. I saw Mr. Wheeler and Mr. Dunlop.

Q. About when did you receive notice from Adamson, or the Adamson Company, that you were infringing the letters patent in suit?

112 A. Sometime along about the latter part of April, I should judge, of this year.

Q. What did you do when you received that notice?

A. Consulted my attorney.

Q. What did you do in regard to selling vulcanizers?

A. Continued to sell them.

Q. Are you prepared to swear positively that you did not temporarily discontinue the sale at that time?

A. I am, yes.

Q. When did you get in communication with the Shaler Company, or with the attorneys of the Shaler Company, with regard to the Adamson patent?

A. Sometime the latter part of April or first of May. I can't say just the exact date.

Q. Was it immediately after the suit was threatened against you?

A. No, I don't think it was. It might have been—yes, it was before suit had been threatened.

Q. And you have since that time busied yourself with obtaining evidence for the Shaler Company in this matter?

A. Obtaining evidence for myself and the Shaler Company, yes.

Q. Where did you get the iron vulcanizer that you took down to the South St. Louis foundry to have the castings made that you say were made in August, 1911?

A. I didn't take the iron castings down there.

Q. What did you take?

A. I took a wooden pattern down there.

Q. Where did you obtain that?

A. I made it.

Q. Are you a pattern maker?

A. I served my apprenticeship—

Court (interrupting:) Are you a pattern maker?

A. I am not a pattern maker, no; I have made patterns; made quite a few of them.

Q. What did you make this one out of?

A. Out of wood.

Q. I call your attention to defendant's exhibits 10 and 15; are these the two exhibits that you testified to in St. Louis?

A. Yes, sir.

Q. Where were they made?

A. South St. Louis foundry.

Q. At about what time?

A. The castings were delivered to me, that is, the original bunch of castings were delivered to me, on August 7, 1911. This one here (indicating) was one of the original bunch.

(Witness indicates Exhibit 15.)

113 Q. Was this Exhibit 10 one of the original bunch?

A. It was one that was given to me down at the foundry some time the early part of the year.

Q. Then you are not sure whether this exhibit 10 is one of the originals or not?

A. Well, I have the word of the foundry that it is one of the first lots that he made for me; that they had found it in the sand, and had started to plane it off, and use it, and found the casting too hard.

Q. Where did you make the pattern that you say you furnished the South St. foundry for these castings?

A. In my home.

Q. What did you make it out of?

A. Out of wood.

Q. Can you give a description of how you made it?

A. Yes, sir.

Q. Please do so.

A. I had a foot-power lathe in my cellar, and I turned out the shell on this foot-power lathe; and turned out the pins on the foot-power lathe.

Q. How were the pins fastened in?

A. There was a hole drilled through—this plate was separate; these holes are drilled through this bottom-plate, and the wooden pins stuck into this wooden plate. This outside shell was glued onto the bottom-plate, and fastened with small brads.

Q. Was the device as complete in other particulars as is this Exhibit 10—that is to say, as to the ears and lugs?

A. That casting is as it come out of the sand.

Q. And is a complete reproduction of the pattern?

A. Yes, sir.

Q. How many pins do you recall that you put into that pattern?

A. There was 19, I believe.

Q. How did you lay them off?

A. I laid them off with a compass.

Q. Now, in making your 1912 casting, which I believe you testified was made sometime in February 1912, did you make a separate pattern for that?

A. No.

Q. What did you use for that?

A. I took one of these castings here, and had it ground up, and worked on these pins with emery and files, and got them down—

Q. (Interrupting.) That is, you took one of the original castings?

A. Yes, sir.

114 Q. And what success did the foundry have in the making of those?

A. The same trouble that we had with the original wood patterns, that the metal in flowing across the bottom—the casting is made in this position, with the metal flowing across the bottom—through this gate here on the side—would run across and hit the pins first, and lay in there and chill; and when the other metal run over it the iron in the pins would chill until they were cold-shot, and the pins would not stay on.

Q. You got about the same results at first with the 1912 casting as you did with the 1911?

A. About the same results, yes. We got a few of the castings. The factory then took the casting—the pattern that I had brought down to them—and rammed it full of core-sand, and tried it that way, and

was able to save the pins more, on account that they could pour it harder, and get the metal into the moulding, and not wash away the center. And then he told me to make a core-box; showed me that it could be made; and save those pins in there to a great deal better advantage, and cost me less, and cost the foundry less to make them.

Q. You have just spoken of a technical process. I think you spoke of using core-sand?

A. Yes, sir.

Q. Do I understand that was making a separate pattern of the pins?

A. No, that was taking the pattern like this, with all the pins complete, and taking sand, common river or lake sand and clay, or loam, as they call it—sharp sand and loam, and by putting resin or molasses in it as a binder, and mixing it in a mass, and putting it down in here, ramming it in there, and then tapping the vulcanizer on the side, and turning the vulcanizer over that way (indicating), and pulling this core out of here, and setting it in an oven and drying it.

Q. That performed the function of a core-box?

A. That performed the function of a core-box on the first few that he made.

Q. Then in using that what would be termed the core?

A. Yes, it was a core.

Q. (Continuing). In using that core so made as you have just described, its relation to the outer chamber might vary in casting a complete article—that is to say, the pins might be moved slightly?

A. No, it would be impossible for the pins to be removed, only inasmuch as the core might be twisted around one side or the other.

115 Q. As a body, they might be?

A. As a body, yes, sir. The vulcanizers would not come out with the pins all in identically the same position.

Q. Please tell the Court why you waited until February or March 1912, before going on the market with this device.

A. Because I was broke, I didn't have the money.

Q. You were perfectly satisfied it was a remarkable device?

A. Yes, sir.

Q. And you came into money in February or March, 1912?

A. I had gone to work for the Banner Rubber Company, or the Stearns Rubber Company, as it was called at that time, on January 1, 1912, as sales manager of their tire department. The Banner Rubber Company was not able to produce the goods that the Stearns Rubber Company wanted, and on the 22nd of January the Stearns Rubber Company went out of existence. They quit business. I had my salary for that month's work.

Q. About how long after you conceived the idea of a vulcanizer with pins in it was it that you had the first casting made, that you say was August 8, 1911?

A. It wasn't the 8th. It was August 7th I got the casting.

Court: Well,—is near enough.

(Question repeated.)

A. Well, along the latter part of July, when we had first talked this matter over with the Koochook Rubber Company--Mr. Huber. Mr. Huber was the man that suggested putting it on the market. I told him: What was the use? That anyone could go to a hardware store and buy a ladle and a C-clamp, costing them about 20 cents, and they would have a vulcanizer. Well, he says, make it up in some other kind of way. He is the man who suggested putting ears on the side, to clamp it down. We talked about using the clamp for conducting the heat. He said: "Why, put pins in it."

Q. How did you determine the height of the cup for this vulcanizer?

A. Figuring about the height of the pan. We took the pan, and we made it a little bit larger on the bottom than the pan, and not quite as deep.

Q. Then it was mere guesswork, was it?

A. Practically.

Q. And you have never varied it?

A. Personally, no.

Q. How did you determine the height of the pins with respect to the height of the enclosure?

116 A. Why, there wasn't anything to determine. We just simply put the pins in there. It wouldn't have done any good to put them up any higher than the side of the vulcanizer, and I made them practically the same length.

Q. You made no experiments, however?

A. Why, it wasn't necessary to make any experiments as long as the ladle had worked. There was no reason why that shouldn't work. Any open pan would have worked regardless of the shape or size of the pins that was in it.

Q. It never occurred to you that if your pins projected above the level of the rim you might get more heat at the bottom?

A. I don't see why you should.

Court: The question is: Did it ever occur to you?

A. No.

Q. Did you do any calculating to decide the distance between the openings in the lugs?

A. Only to measure it off.

Q. Compare it with any automobile tire tubes, as to width?

A. Simply in my mind, that is all. I knew that with that vulcanizer, as we made it, it wasn't big enough to take the biggest tubes that were made.

Q. Do you remember the dimensions of this vulcanizer?

A. I do not; no, not the exact dimensions.

Q. You say you measured it off?

A. I measured it off at the time. I remember measuring to get the lugs the same.

Q. Do you recall why these fins—if I may term them such—were placed upon the lugs?

A. To strengthen the lugs.

Q. Have you any recollection why you disposed the openings in the lugs in opposite directions?

A. No, not necessarily.

Q. That was an accident?

A. Well, handy to take off.

Q. When did you first hear that the Adamson application was involved in the interference?

A. I think the first that I seen of that was along in the summer of 1912.

Q. Do you recollect where you got your information?

A. I think I saw an advertisement in one of the journals, that he was advertising that he had a patent, and he was going to prosecute all infringers of his patent.

Q. You understood my question did you not?

A. I spoke of the Adamson interference.

A. Well, the Adamson interference; I knew nothing of Adamson's interference until the early part of this year.

117 Q. Where did you obtain your knowledge?

A. I believe I obtained my knowledge from a man by the name of Miley; the first that I knew of any interference proceedings.

Q. What Miley was that?

A. Of the McGraw Tire & Rubber Company.

Q. What further knowledge did you obtain as to the Adamson interference?

A. I met Mr. Miley in Indianapolis.

Q. I am not referring to information from Mr. Miley. I refer to any further information from others?

A. He was the first one I had ever heard anything from in regard to it at all.

Q. I repeat my question, as to others?

A. The next I heard of was through my attorneys, when I had gone to them for some other advice, and had the papers looked up.

Q. And when was that, approximately, if you cannot give the exact date?

A. It was right after I came back from Indianapolis. I should think that was in June.

Q. They gave you full information, did they not, as to what was disclosed in the Adamson interference papers in the Patent Office.

A. Why, we sent for the papers. We got part of them, but just what they were now I can't recall.

Q. You were fully aware at the time, and long before you gave your testimony in this case, were you not, that Adamson's earliest date shown in the patent office was August 19, 1911?

A. I do not.

Q. You had no knowledge of that?

A. I had no such knowledge as that, no. I know all his patent papers that I had seen, that I had a copy of, showed that he had applied for a patent in October, 1911; and I didn't know that until after I had taken the trouble to look up the patents.

Q. I hand you a copy of the Adamson patent in suit and call your attention to plan view at the top, and call your attention to

the pins. Is that arrangement of the pins similar to that of your original casting in 1911?

A. Yes.

Q. Do you recall how you happened to determine on that particular arrangement of the pins?

A. The way I laid them off with my compass.

Q. Just haphazardly?

118 A. Haphazardly practically, yes. There wasn't any technical figuring done on it. I am not a technical man.

Q. It just happened that you struck that peculiar arrangement?

A. Yes.

Mr. Hills: That is all.

Examined by the Court:

Q. You had these first castings made in the early part of August, 1911?

A. I did, yes, sir.

Q. And when did you start to work at your pattern?

A. Along in July, I should judge, about the 25th, 24th, somewhere along in there.

Q. And what had you done prior to the time, of working out your pattern, in the way of developing this design? Anything?

A. No, only what we had talked of at the Koochook Rubber Company sales room.

Q. Make any drawings at all?

A. Only a lead pencil drawing.

Q. Who made that?

A. Well, Huber and myself.

Q. In making that drawing did you develop substantially what is now embodied in Exhibits 10 and 15?

A. Practically the same thing, yes, sir.

Q. And you did that without reference to any other printed publication or drawing?

A. Without reference to any printed publication or drawing.

Q. You had never seen anything like that before?

A. I had not, only in the shape of—

Q. And that you did with the number of pins and the shape and arrangement of the pins, developed just the way you stated?

A. Just the way I stated.

Q. You had never seen any construction prior to that time that involved the use of pins?

A. The construction in the old porcupine principle of distributing heat.

Q. Had you ever seen it in connection with any vulcanizing device?

A. Not in any vulcanizing device.

Q. And there is no explanation you offer for the adoption of that number and arrangement of pins?

A. No, none whatever.

Q. Except the fact you adopted it?

A. Except I adopted it, yes, sir.

Q. Where did you get the idea of having lugs appear on Exhibits 10 and 15

A. The idea of the lugs—when I talked with Mr. Huber about putting the thing on the market in a salable condition, I mentioned the fact: "What is the use, anybody can go to a hardware store and buy a ladle for ten cents, and a C-clamp for ten cents." He 119 said: "Why you don't have to make it like that, make it with wings on the sides, not use the C-clamp at all?"

Q. How were those lugs to be used?

A. They were to be clamped down on a board, clamped down with screws.

Q. The screws to be used upon any block that you might have handy?

A. Any block you may have handy.

Q. (Continued) Or some permanent structure?

A. Any block they might fit. I seen them used right down on the bench, on a piece of 2 x 4."

Counsel for defendant further objected to said Complainant's Exhibit No. 17 as incomplete.

The Court: (To Mr. James A. Carr) You can look it over and if you want to ask the witness anything about it hereafter you can do so. If there is anything in that testimony that suggests itself to you, you can examine him afterwards.

To which ruling of the Court counsel for defendant then and then duly excepted.

WILLIAM T. MALLOW, a witness for defendant, testified:

I am connected with the Liberty Foundry, and was in 1911.

In January 1912, Mr. Gilliland brought us an iron pattern. It appeared to be very rough and had been filed up and made to do for a pattern, and he wanted some castings. We experimented with this pattern several days, a couple of weeks, and waiting for Mr. Gilliland to come down and pay us a cash deposit, because he had no established credit in St. Louis, or any other means so we could collect if we should make castings for him in large quantities. Of course, at the same time Mr. Gilliland came down we told him that they could not be made that way and advised him to get a core box, and he took the pattern away and came back in a couple of weeks with a core box. We tried these castings out at that time and made several successful samples and submitted them to Mr. Gilliland later, and the first record we have of Mr. Gilliland receiving any castings and paying for them was February 27, 1912.

He first came bringing a casting which was to be used as a pattern, the middle part of January, 1912. It was an iron cup-shaped pattern with several posts on the inside and two arms extending on either side, with slots in opposite directions. This casting 120 (Defendant's Exhibit 10), is as near similar to it as any here excepting the pattern we had had all these posts around it and it was filed up; it is similar. Exhibit 10 is a rough casting made without a core, and made with rough sand similar to that

used in making heavy castings. It is not similar to the work done in our foundry. It is similar to the work done in the South St. Louis Foundry. The pattern he brought us was similar to Exhibit 10, but it had apparently all of the pins, none broken off. It had all the burrs and rough edges filed off, smoothed over and probably had been polished. The first day he came down he did not bring any plate. The most noticeable difference between Complainant's Exhibit 14 and Defendant's Exhibits 10 and 15 made at the South St. Louis Foundry, is the two arms of Defendant's Exhibit 10 are a good deal higher, at least $\frac{3}{8}$ of an inch higher than the arms on Exhibit No. 14. That is the most notable difference. Also, the top of the arm has a convex side for the thumb screw to slip in, which does not show on this other. The slots on Defendant's Exhibit 10 are in opposite directions and the slots on No. 14 are in the same direction. Defendant's Exhibit 10 or Defendant's Exhibit 15 could not have been made from Complainant's Exhibit 14; nor could either Exhibit 10 or 15 have been made from a pattern taken from Complainant's Exhibit 14.

Mr. Hills: We do not deny that they were made at the Liberty Foundry in February. We do not care anything about that.

WILLIAM J. BAIER, a witness for defendant, testified:

I am, and was in 1911, employed by the Boehl Hardware Company. We sold Mr. Gilliland quite a lot of hardware during the summer of 1911. Referring to the extension bit transaction. I know Mr. Gilliland called me up one day and asked me if I would loan him a bit. I asked him what kind of a bit and he said a bit that would bore a 3" hole, so I wanted to sell it to him, I did not want to loan it to him. I asked him why he did not want to buy one, we don't like to loan tools. He said he had a special occasion to use one for and did not like to buy a bit for that purpose. I consented and told him first he could have it and he said, "I will get it." Then his brother-in-law was working for us at the time, Mr. Spoeneman, and I gave him the bit for Mr. Gilliland. The bit came back a little later; I don't know exactly what date it was, I have no record of it, probably a couple days or a week. This is the only time that I loaned the bit to Mr. Gilliland or turned it over to Mr. Spoeneman. I can't fix the date of the loan. I just know

121 Mr. Spoeneman worked for us about three months and he quit on the 3rd of July, so I know it was ahead of that time, just shortly, a couple of days. It was handed by me to Mr. Spoeneman who was then in our employ. He never worked for us after the 3rd of July. I don't remember by whom it was brought back. In a case of that kind we just make a memorandum and put it in the cash register, Mr. So and So, loaned a wrench or bit, whatever it may be, and when he brings it back, whatever clerk gets the article brought back, he destroys the slip and don't make an entry of it at all. I know Mr. Spoeneman quit our employ on the third, because he was paid off on July 4, on that morning, by Mr. Boehl. We have a record in a petty cash book to show that. The petty cash

book is here and shows that. We loaned this bit before July 3rd and it was returned in about a week, maybe a couple of days, not over two weeks any way.

HARRY SPOENEMAN, a witness for defendant, testified:

I am a brother-in-law of Mr. Gilliland. In the summer of 1912 I was employed by the Boehl Hardware Company. I quit there the first of July. While I was there we had a transaction relating to the extension bit. One night I went to go home and Mr. Baier called me back, that is, Mr. Baier said he had a bit for me to take home, that Dave Gilliland had borrowed from him. It was an extension bit, three inches. It was used to bore a hole three inches in diameter, in wood. I seen a piece of wood Mr. Gilliland had bored with it. I never seen him bore the wood or make the piece, but used to be around his place, in his basement. He had a tool bench in his basement where he done all his work, and I picked up a piece of wood he had bored with this extension bit. At the time I seen it, it was painted black. The piece I picked up was a round piece three inches in diameter, that is the inside of it, and had a lug on each side, and it was painted black. This Exhibit here (indicating Exhibit 10) is on the order of the block of wood that I seen in his basement. I quit the Boehl Hardware Company July 3rd, and think it must have been eight or ten days before I quit that I got this bit, as close as I can remember. I was around his house all the time, off and on; it was the latter part of July, between the middle and the latter part of July that I seen this piece of wood. I never asked any question about it. I saw castings around Mr. Gilliland's place during the month of August in the same year. I seen castings on the order of this casting (indicating Defendant's Exhibit 10) laying around on his tool bench in the basement. I know I seen five or six. I fix that date because I left there the latter part of August and went to Joplin, Missouri; that is, I went from here to 122 to Springfield and stopped along the road on the Frisco.

I stopped at Monett and Carthage. I came back to St. Louis the following summer, 1912.

The piece of wood that I saw didn't have anything inside when I seen it, just the cup piece of wood, just the shell. I didn't see any pins in it. The castings I seen had pins in them.

Counsel for defendant here offered to produce Mrs. D. C. Gilliland which was objected to by counsel for complainant on the ground that under the laws of Missouri a wife cannot testify in a case where her husband is a party.

The Court: I will exclude the testimony because it is incompetent.

RUTH GILLILAND, a witness for defendant, testified:

I am the daughter of Mr. Gilliland. I have seen castings like Defendant's Exhibit 10 down at papa's cellar, at our home on Beethoven Street. I remember when dad was making that wooden one, and then he used to have a lathe there, and he used to make that outside smooth with that lathe. He put his foot on that, on the

the, to make that outside smooth. I first remember the wooden one. It was round like that one and had those prongs sticking up. I had a little white high chair and dad said, "Could I have that high chair? I want to make something out of those back things back there." I cried and I did not want him to have it, but he said he could get me a new one, and I let him have it. It was a doll chair. I don't remember how long ago it was, but I had just started to kindergarten; it was during the summer vacation. I was nine years old last December 27.

Testimony of H. LELAND LOWE, expert witness for defendant, admitted.

(*Testimony for Complainant in Rebuttal.*)

MELVIN N. HUBER, a witness for complainant in rebuttal, testified that he is employed as a salesman by the Koochook Rubber Company, 3150 Locust Street, St. Louis, and is a brother of the Ferdinand Huber mentioned in the evidence. He last saw his brother on Monday morning at the store 3150 Locust Street. He hadn't been here since Monday morning. I do not know where he is. I believe that gentleman over there (indicating Mr. Vernier) called there last Friday.

23 Mr. Hills: I merely produce this witness to show that we had nothing to do with the fact that this other Mr. Huber has not been found. We are quite anxious to meet him ourselves, and made an effort on Monday. Our witness, Mr. Adamson, was asked whether he had anything to do with Mr. Huber's disappearance.

(*Testimony for Defendant in Surrebuttal.*)

A. M. HOLCOMBE, a witness for defendant in surrebuttal, testified: I tried to get this man Huber. I spoke with him at his place of business, 3150 Locust Street, Saturday noon. It was Friday or Saturday noon, I won't say which. Either one or two days previous to that I had a subpoena issued for him; I went out to see whether he had been served. He said he did not want to testify. I asked him if he had been served, and he said no, he had not been served.

Mr. James A. Carr: We would like to make a tender of his deposition in the other case, if the other side is willing.

Mr. Hills: Hardly. We expected to get some information on this occasion.

Mr. James A. Carr: We desire to make a formal tender of the testimony of Mr. Huber in the other case, and I want to call on the complainant to waive an objection to it.

The Court: Counsel does not waive an objection, he objects to it.

Mr. Carr: We want the record to show it.
This was all of the evidence in the case.

(Memorandum Opinion of the District Court.)

The case having been submitted upon the testimony and the arguments of counsel, the Court delivered its opinion orally as follows:

The Court: In this case that was before a Judge of the United States Court of Milwaukee it is claimed here that Mr. Gilliland was a witness; that his deposition was taken and that he was examined orally in court.

All of his claim as to when this work was done by him was before Judge Geiger. Judge Geiger has decided the case not only upon the testimony given before him, but with the depositions of Mr.

Gilliland and Mr. Huber before him. With the fact that the defendant was examined at length in that particular

case (and he was examined along the lines that follow here) that matter being before Judge Geiger) he decided in favor of the validity of this patent and held not only that the presumption of law that arises in favor of the action of the parties giving the patent was controlling in measure, but was convinced by the testimony he heard that this was a patented invention and that the patent was granted to this complainant, notwithstanding the claim made in the testimony of Mr. Gilliland.

Certain other testimony was introduced here which I am asked to say supplements Mr. Gilliland's testimony, and had that been before Judge Geiger as it is now before this Court, a different ruling might have been made by Judge Geiger. I am not going into the question of this additional evidence, as it will serve no good purpose. There are some matters in this new testimony that do not favorably impress themselves. I know that a great many witnesses were examined and it is a singular thing that many of these molders and employees who were there at the time told virtually the same story one as the other, and each recollects the time about the same way. Each one of the others recollects it. As I have said, I am not going into a discussion of that. My own judgment is that had all of this new testimony been before Judge Geiger at the time he decided the case, it is not of such character as would change Judge Geiger's opinion.

My opinion, therefore, is that following the rule that has been long adopted and followed in the various Courts in this country where a claimant of a particular device is examined before the Court, it becomes my duty as Judge to follow the decision of the Court in the first instance. Believing that it is my duty to follow the decision of Judge Geiger, and knowing, as the record shows, that both Mr. Gilliland and Mr. Huber were examined as witnesses before that Court, either orally or by deposition, I cannot say that the testimony now introduced here would have changed Judge Geiger's opinion at all.

The complainant is entitled to recover in this action. Let a decree be entered in accordance with the prayer of the bill.

125 (*Amendments by Appellee to Statement of Evidence Prepared by Appellant.*)

* * * * *

(Here follows certain Amendments by Appellee to the Statement of the Evidence prepared by the Appellant, which Amendments, except the following condensed Statement of Evidence taken by deposition at Akron, Ohio, have been inserted throughout the Statement prepared by the Appellant at the places indicated in such Amendments.)

Condensed Statement of Evidence Offered on Behalf of Complainant, and Taken by Deposition at Akron, Ohio, Monday, December 1, 1913.

Anthony J. Dietrick.

ANTHONY J. DIETRICK, a witness for complainant, being duly sworn, testified:

My name is Anthony J. Dietrick. I live at Akron, Ohio, and am a pattern maker, having been engaged in that business during the year 1911, having a partner Brunswick, the firm being Dietrick & Brunswick. The firm now is The J. Dietrick Pattern Works. I have known C. F. Adamson for ten years or more and in October, 1911, did some work for him and done quite a bit after that. The work done in 1911 was the making of two hardwood patterns for vulcanizers, the order being No. 380 in my order book. The item is given as follows: "C. F. Adamson, order 380, 2 hardwood patterns to blue print, for vulcanizer, \$4.50, October 16, 1911. Paid."

The production of the order book in evidence is waived by counsel for defendant.

This work was brought to me by Mr. McCormish, whom I always called "Mac," and who was connected with Adamson to a certain extent, a draftsman or something. He first brought a sketch as I remember, but I don't know if we made that pattern off that sketch or not; but I know we made it off a blue print; it was finished off a blue print, but I don't recollect what it was started from. The paper handed me is a tracing, and the slot in the lug on one side is opposite the slot in the lug on the other side. When we first made the pattern we forgot to put the rib in, and it was brought back and we put the rib in, said rib being indicated on the tracing by the letter "A." The letter "B" indicates the slots that were turned the other way, (the witness indicates that the slots faced in opposite directions). When the pattern was made the slots faced in opposite directions and was made out of mahogany. The date, October 16, 1911, is the date that I billed the work, that is, shipped the pattern, and this was about five or six days after the work was placed in my hands.

The drawing referred to by witness is offered in evidence, and the notary is requested to mark the same "Adamson's Exhibit A."

The blue print that I made the pattern from was as I remember just exactly like Exhibit A only the lugs was opposite and on blue paper. It was printed off a tracing for there was everything—the dimension, as close as I can recall, everything just the same on that, only the lugs was opposite. The parts marked "A" on Exhibit A were on there and the men that made it forgot it. I didn't make the pattern but handed it to my workman and supervised it, and he forgot those little lugs, and two or three days later it came back and I put them in. These parts are more properly called ribs. The No. 380 in my order book was taken from the order blank given me and this number must appear on the invoice. That is the reason I put the number on.

Cross-examination:

The entry in my order book dated December 11, 1911, referred to some long vulcanizers about 8 inches in length. There were three different sizes made from 8 to 16 inches long, and there were pins in them just like the little one. They were the same, only they were in oblong shape and there were several hundred pins in them. The date, April 22, 1912, appearing in connection with this entry, is the date when the bill was paid.

It was stipulated that the book containing the Adamson entry as well as the matter referred to on cross-examination be cut from the book, and the same is offered in evidence and marked "Adamson's Exhibit B." The hardwood pattern had the pins in the central cavity just as shown in the Exhibit drawing "A", spaced, as close as I can remember, right to that drawing. They were made separately and were turned with a little shoulder and drilled holes, and glued them in there. The job comprised two pieces, a cup containing these pins and one bottom plate to fit on the bottom of it with a recess cut for a kind of rind. It was the same as this here (indicating two top figures on the drawing Exhibit A.)

KENNETH L. DOUGLAS, produced on behalf of complainant, being first duly sworn, testified:

I live in Akron, Ohio, and have been employed by Mr. A. J. Dietrick of Akron, Ohio, as a pattern maker, and was employed in the Dietrick & Brunswick works in the year 1911, entering their employ some time in September. I have known C. F. Adamson for twelve or fifteen years, and in 1911 made a small vulcanizer for him in sets consisting of two patterns each. I made three sets. The main part was a cup or retainer for gasoline, containing 19 pins in the inside, lugs on the outside with small rib to them. The other was just a plate for on the bottom of it. These lugs were slotted. I did this work two or three weeks or a month after I entered their employ. The first pattern was made of mahogany, and referring to Adamson's Exhibit A, I can't say that I ever saw this, but I saw a drawing exactly like this. I had a blue print but the measurements

were almost the same in every particular, as near as I can see on this exhibit. The blue print was given me by Mr. Dietrick to make the pattern for him some time in October, or the latter part of September, 1911, and from this blue print I made the first Adamson vulcanizer. As to the parts marked "B" on Adamson's Exhibit A, in the third figure from the top, the pattern I made was not like this, the slots facing in opposite directions, while on this they face the same. Respecting the parts marked "A" on said Exhibit, they were supposed to have ribs like that, but I didn't put them on at first, if I remember right. It came back a few days later and I had to put them on. The parts indicated by circles in the third figure from the top in Adamson's Exhibit A are what I would call pins. They are projections from the bottom of that cup. I made these pins and I have found one which I wore for quite a while on my watch charm.

The pin produced by the witness is offered in evidence and marked "Complainant's Exhibit C."

I know that the work was done for C. F. Adamson because his name was on the blue print.

Cross-examination:

I found the pin, Exhibit C, in drawer of my bench, and I am positive that it is the same pin that I used on my watch fob. I identify by the hole in the base of it where it was attached to my fob. I fixed the date of doing this work as prior to the last 128 of October, 1911, because I discussed making these pins with my father who was sick at the time. At that time I didn't know what I was making, but learned afterwards.

P. J. Boylan.

P. J. BOYLAN, a witness called on behalf of complainant, being duly sworn, testified:

I am secretary of the Taplin-Rice-Clerkin Company, Akron, Ohio, and reside in Akron. I have been connected with them for four years. I have known William E. McCormish of Akron for eight or ten years. By referring to our order book I find that in October, 1911, we did some work for Mr. McCormish, the same being two small castings made from a couple of small patterns which Mr. McCormish gave me, which he told me at the time was a vulcanizer. One of the castings was a flat plate with a projection on each end, and the other was cup-shape, with projections on the end and pins in the center of the cup. In my order book I find the following entry on page 80:

"October 12, 1911, order 2629, C. F. Adamson, City, 2 castings from each of two patterns."

This is billed "charged to C. F. Adamson." It was invoiced to him on October 27th. Mr. McCormish gave me the pattern to have it cast, telling me that it was for Mr. Adamson and the bill

for the order was made out to C. F. Adamson, City. This order was entered on our record October 12, 1911, but may have been given to me the day before and record not made until the following day, and was billed out October 27, 1911. There was considerable trouble in making the castings, I think they made two or three of them before they got a perfect casting or near perfect. Defendant's Exhibit No. 15 looks to be the same as the one we made; the general construction of it is the same in my eyes.

It is stipulated that the order book produced by the witness be waived, and that a photographic copy of the book referred to by witness be made and offered in evidence in lieu thereof. The photographic copy so referred to is offered in evidence and marked "Complainant's Exhibit D."

The pattern was a wood pattern and painted black. I don't know who made it. The castings were furnished to Mr. McCormish and we did nothing further after that on this order.

129 Cross-examination.

Witness identified Complainant's Exhibit A as like the castings which were made by his company. I don't recall as to which way the slots were turned. The entries in the book were made by Ira W. Fiscus, who entered all orders at that time. Aside from the order book, I couldn't remember the date of making these patterns. I knew the patterns were handed to me to have castings made and then I remember it as a brand new pattern. I didn't see the castings after they were made. The trouble about making the castings was that they couldn't get the pins to run out full.

William E. McCormish.

WILLIAM E. McCORMISH, a witness produced on behalf of complainant, being duly sworn, testified:

I reside in Akron, Ohio, and in 1911 was engaged in the engineering business with Mr. C. F. Adamson, having been with him about eight years. During 1911, Mr. Adamson spent most of his time in East Palestine, Ohio, while I was engaged at the Akron office, said office being in the name of C. F. Adamson. During 1911, I was constantly in touch with Mr. Adamson, probably every day, and once or twice a day we would talk over the long distance phone, and once a week I visited him at East Palestine, where we went over different matters. In 1911 Mr. Adamson told me at times that he had a new idea on vulcanizing, but never went into details until one day I was there and he made a few sketches showing some of his ideas. I here produce the sketch then made. This sketch was made on August 19, 1911, in East Palestine. I had come down to East Palestine about noon and after going to the McGraw Company, probably where Mr. Adamson spent most of his time, I stayed over for supper and after supper Mr. Adamson made the sketches showing what his idea was on a rubber vulcanizer, and after mak-

ing the sketches we decided on the particular design that I should take up to Akron and have made. I was busy at Akron at that time and didn't pay much attention to it. Mr. Adamson called me up a couple of times on the phone regarding what I had done; I told him I hadn't done anything. I think it was Labor Day he came to Akron and I not having done anything with the drawing, he took it back with him, said that he would have the vulcanizer made in East Palestine. Shortly after that when I was in East Palestine, he had made one up with pins in, and was experimenting with it, and after supper again, and after trying it out in the afternoon, he made another sketch and said I should take it back to Akron and have some patterns made and castings and express them to him as soon as possible, which I did. Re-

30 specting the drawing made August 19, 1911, I took the same with me that evening back to Akron and let it lay in my office without doing anything with it. The name "W. E. McCormish" on the drawing is my signature, made at the time the sketches were made on the sheet. It was our custom to witness all drawings or sketches. The two names below mine I saw signed thereon on August 19th. The name "C. F. Adamson" was signed by Mr. Adamson on August 19, 1911. All this was done at Mr. Adamson's house in East Palestine after supper on the dining room table. Mr. Adamson made the sketches and gave me instructions as to what to do with them and had the other members of the family who were there to sign it as witnesses. The one that we were going to make first is here numbered 2 and the drawing No. 3 is a plan top view of the section marked "2". Drawing No. 1 illustrates the idea or principle of the vulcanizer, and we were going to have No. 4 and No. 5 made, but thought that No. 2 could be made much easier and therefore decided on that. I first saw the vulcanizer at East Palestine in the neighborhood of three or four weeks after Labor Day.

The drawing referred to by witness is offered in evidence and marked "Complainant's Exhibit E."

I produce the sketches that I received on that occasion from Mr. Adamson.

The sketches now produced by witness are offered in evidence and marked "Complainant's Exhibit F."

These drawings Exhibit F, were made at Mr. Adamson's house in the evening after experimenting with the one which I had seen that day, and he then made these two sheets of sketches and told me to take them to Akron and have patterns made, and have a couple of castings made from them right away and express them to him. I immediately took the sketches to Dietrick & Brunswick pattern shop, showed him the sketches, told him it was a rush job and to get them out at once, and I think I made another pencil sketch for him to get started with, telling him that I would bring a blue print the next day or so. I then made a tracing from the sketches, had blue prints made from it, and took the blue print out to Dietrick & Brunswick. I then got in touch with P. J. Boylan

of Taplin-Rice-Clerkin Company, telling him that I wanted some patterns made, and that it was a rush job. A couple of days after I gave Dietrick & Brunswick the order to make the patterns they phoned me that they were finished, and I brought them down to Mr. Boylan at the Taplin Company's office then on Main Street. They worked four or five days before they got one that was acceptable, which I immediately expressed to Mr. Adamson, and he called my attention to the fact that it has no ribs on the lugs. I then got the pattern from the Taplin-Rice-Clerkin Co., took it back to Dietrick & Brunswick where they then put the little ribs on the lugs of the pattern, which they had forgotten to put on in making the original pattern. I identify on the table in front of me the linen tracing drawing that was made for the purpose of obtaining the blue print to furnish Brunswick & Dietrick (witness identifies Complainant's Exhibit A). The blue prints were made from this tracing and furnished Dietrick & Brunswick, but the tracing has been changed since. The location of the slots in the lugs has been changed. The original tracing was made with the slots opposite, which as afterwards erased on the tracing and made to show the slots both on the same side. The slots are lettered on this drawing Exhibit A with the letter "B." Only one of the slots was changed, the one on the right hand side, and this change was probably made a week or ten days after the original tracing, which was dated October 10th.

After the Taplin Company had made a couple of castings and I had sent them to Mr. Adamson at East Palestine, he phoned me to get the wooden patterns, take them with me, and meet him in Cleveland, which I did, and we went to the Ohio Foundry Company, and ordered one hundred castings to be made as quickly as possible, [send] by express to Mr. Adamson at East Palestine. I then sent them an order from the Akron office for the casting confirming the order given them in Cleveland, and they continued to make the castings. We had a regular form of order book in Akron, said book being in bound form with about one hundred numbered orders with duplicates to a book. The original was given to the party who was to furnish us with work or other material, and the duplicate remained in the book. I have here the order book which we used in 1911, and our order No. 380 shows that Dietrick & Brunswick, City, was given an order for one hardwood pattern per blue print, signed C. F. Adamson, per W. E. Mc., or my initials. I wrote this order and this is the duplicate of the original being made through a carbon sheet and dated October 11, 1911. The original of this order was given to Dietrick & Brunswick. The next order No. 381 was to the Ohio Foundry Company, Cleveland, Ohio, dated October 30, 1911, and calls for "100 castings per blue print, No. 898, casting No. A, 100 castings per blue print, No. 898, casting No. B," also signed "C. F. Adamson per W. E. M." This order is in pencil whereas most of the other orders in the book are from carbon copies. This occurred once in a while and was due to the carbon being reversed and writing on the back of the original instead of on the duplicate.

In those cases the order was made out in pencil just the same as the original. Another instance of this is an order No. 343, dated April 13, 1911, to the Houghton Elevator & Machine Co., Toledo, Ohio. When we took this pattern to the Ohio Foundry Company the ribs originally left off had been put on by Dietrick & Brunswick. We received a bill from the Taplin Company for this casting which I here produce.

The bill produced by the witness is offered in evidence and marked "Complainant's Exhibit G".

The bill is dated October 27, 1911, and refers to the two castings made from the two patterns which I had given to Mr. Boylan.

The order book testified by the witness is offered in evidence and marked "Complainant's Exhibit H."

Order No. 380 in Exhibit H. to Dietrick & Brunswick Company reads:

"1 hardwood pattern per Bp."

In writing this I had in my possession the only pattern with the pins on, and not the pattern for the bottom plate, while in reality two patterns, or two pieces, it is merely meant for the one vulcanizer. This book, Exhibit H, is not intended as an accurate description of articles ordered, but merely a memorandum.

Certain papers are handed to witness who testifies as to them as follows:

I identify sheet 1, pink sheet, as the directions for using the first vulcanizer which Mr. Adamson manufactured. Sheet 2 is yellow and is the directions for using the "Imperial" vulcanizer made by the McGraw Tire & Rubber Company, East Palestine, Ohio. Sheet 3 is the general description of the principle of the Adamson vulcanizer, giving a cut of the outfit. Sheet 4 is a blue sheet of the McGraw Tire & Rubber Company, being their principle of vulcanizer or repair kit as they call it. The cuts used on the Adamson vulcanizer are identically the same as those used on the "Imperial" or McGraw vulcanizer, with the exception of the vulcanizer in the flame, which is practically the same. On sheet 3 is a perspective view of the vulcanizer, which was made by my first having made half tones and zinc etchings and were made in Akron by the S. & O. Engraving Company. The original half tones were made from the original vulcanizer, or one of the first vulcanizers that was made by the Taplin-Rice-Clerkin Company. I think the outfit was photographed at East Palestine and a negative sent to Akron, and I had the half tones made from the negative.

The papers last testified to by the witness are offered in evidence collectively and marked "Complainant's Exhibit I, Nos. 1, 2, 3 and 4 respectively."

Witness identifies another paper handed him as sheet gotten out Mr. Adamson after the McGraw Tire & Rubber Company had

started making vulcanizers, which gives a notice or warning to infringers on Mr. Adamson's vulcanizers.

The paper last referred to by the witness is offered in evidence and marked "Complainant's Exhibit J."

The perspective view under the word "auto vulcanizer" was made from the original vulcanizer and photographed and the half tones made from that negative. It was made from the same negative as the cut shown in sheet 3 of Exhibit I, only it is a larger half tone.

I testified in the case of C. F. Adamson vs. the McGraw Tire & Rubber Company, infringement on Mr. Adamson's patent. Wm. Major was the other party. I identify Complainant's Exhibit E, Complainant's Exhibit A and Complainant's Exhibit F and I think Complainant's Exhibits G and H as testified to by me in the matter relating to the McGraw Tire & Rubber Company.

Cross-examination:

The suit with the McGraw Tire & Rubber Company was an interference suit, and was pending in the United States Patent Office.

"X Q. 15. Now, when Adamson explained this vulcanizer to you August 19, 1911, tell us, as near as you can, just what he said about it?

A. Well, we sat down to the table, and he told me that he had been thinking of something for a quick repair for an automobile tube, and he had an idea of a principle which could be used with gasoline; and he made a sketch up in the corner, which is marked

"1" on Exhibit E, explaining to me the principle, pouring 134 the gasoline in a cup-shape which had a center-post extending upright; that the gasoline or the heat would heat -he center post and transmit the heat to the bottom of the cup, thereby producing the heat for curing the patch. And he also knew or stated that it would take a specially quick repair gum of some kind, or rubber, to work with the vulcanizer. Explained the automatic temperature of the gasoline, and of the heating of the cup.

16. X Q. Did he say he had tried that?

A. No, he hadn't tried it. He just had the idea. And he then made Sketch No. 2, showing what might be practical by taking a piece of metal and turning it out, grooving it, you might say, so rings might be shown, and gasoline would be pouring in there, and worked it on that principle.

17. X Q. And how was the temperature to be automatically controlled? What did he say about that?

A. Well, the temperature would be controlled automatically with the heat as the—of course, the gasoline would—the hotter the cup would get, the—the what was that question again?

Question repeated to witness by notary.

A. Why, he stated that the hotter the cup—why, it's getting me rattled now. As the cup was heated, it would, of course, boil the gasoline, and it would—the flame would lower—the hotter the gasoline got, the lower the flame would be; and, as the cup cooled,

or the temperature cooled, the flame would be higher; and the higher the flame, the more heat it would produce in the center-post, that is, there would be more flame to heat the post.

18. X Q. Wasn't the explanation made at some other time than August 19, 1911?

A. He had spoken about the proposition with a gasoline vulcanizer; but I never thought very much about it, and didn't pay much attention to it until this particular date when he asked me to stay over. I generally went out of there in 5 o'clock in the evening, or 5:30; and he asked me to stay over that night to make some sketches.

19. X Q. Yes, but this explanation as to the principle upon which the vulcanizer was to operate—are you sure that it was as early as August 19, 1911, or was it later than that?

A. No, it was—he had spoken to me even before that date about a vulcanizer, a quick-repair vulcanizer, but I never paid much attention to it.

20. X Q. No, but I am asking about this explanation as to the principle of operation. Did he explain that idea of the temperature rising and falling, and causing the flame to rise and fall, August 19th, 1911?

A. Just read that question.

Question repeated to witness by notary.

A. Yes, sir, it was on that date he again explained it to me,

21. X Q. And he also told you on that same date that a pin was necessary to carry the heat down into the base, did he?

A. Well, he didn't say that was absolutely necessary. He simply drew it in that form to illustrate the manner of heating the cup; didn't say it would necessarily be one pin or a dozen pins, or even rings.

22. X Q. But he did indicate that something of that sort was necessary to carry the heat down into the base, did he?

A. Yes, sir.

23. X Q. And he told you that it would be necessary to have something of that sort?

A. Yes sir.

24. X Q. And did he say anything about the side walls carrying the heat down to the base?

A. Well, that would carry it down as well, but he didn't think it would carry enough heat in the center of the vulcanizer, just heat the side wall.

25. X Q. Did he say anything about that, or was that your idea,—that the side walls would carry it down?

A. Well, I don't remember anything definite was spoken about that; but it was reasonable to believe that the side walls wouldn't give an even temperature across the bottom of the cup.

26. X Q. You don't remember, then, that he said anything about the side walls carrying the heat?

A. Well, he said that the side walls, of course, would carry the

heat down to the base, but they would have to have something in the center to make a more even heat on the bottom, as I remember.

27. X Q. Did he say anything about using a clamp to serve the purpose?

A. No, there was nothing *was* mentioned at that time, as I remember it, about—I don't think we went into the details for the clamping or the plan. It was merely to illustrate the principle, to work out the principle."

I made the changes on the tracing Exhibit A as to the rereversed slots, and did the erasing I think with a rubber gritty ink eraser. This change was suggested by Mr. Adamson shortly after we started making the castings at Cleveland. I don't just remember the date and all vulcanizers made subsequently had the slots faced in the same direction. The first castings, however, made at Cleve-

136 land were made in accordance with the original blue print.

I don't think it was much over a month at the most when this change was made. I rather think there were about a hundred or two castings made with the slots reversed, as near as I can remember. We went to Cleveland because the local foundry didn't have the right kind of iron and never made such small castings of that character. The Ohio Foundry Company had no trouble in making the castings, though the first three or four were a little rough on the inside. To my knowledge they had never made previous similar castings, and nothing was said at that time about their having made other vulcanizers of a similar type. Nothing was said at that time or at any other time. The first I heard of other vulcanizers being made was in February or March of 1911, when I learned that the McGraw people had been in Cleveland getting prices on a similar article. I first heard of a difficulty with the McGraw people either the latter part of December, or the first of January. The idea of ears on the vulcanizer was entirely originated with Mr. Adamson, and they were put on there for the purpose of clamping the vulcanizer to the bottom plate. Up to this time Mr. Adamson in his experimenting with his vulcanizers had been using a sort of G-clamp with a wooden block underneath or else clamped to the bench, then he took a piece of wood six or eight inches long and put a couple of bolts in it, and put a clamp over the top of it for clamping the vulcanizer to the board or wood underneath, and with a couple of nuts on top. And these were the first clamps that were used, and would naturally suggest this other form.

"73. X Q. Can you make a sketch of the G-clamp to which you refer?

A. Yes, sir. (Witness does so.)

74. X Q. And why do you call that a G-clamp?

A. Well, that is not a G-clamp. That's what we used before putting the ears or lugs on the vulcanizer, which, I would say, would suggest the design which was used.

75. X Q. But you spoke about using a G-clamp. When did you use that?

A. The G-clamp was simply used to clamp the vulcanizer to a

ordinary bench or whatever—so you would set the vulcanizer on here, and the G-clamp would simply clamp it to the bench.

X Q. 76. And that was a clamp shaped like the letter G, was it not?

A. Yes.

X Q. 77. With a screw at the top, clamping screw?

A. Yes, sir.

X Q. 78. Now please make a sketch of the G-clamp so that we can see just what you mean by that. You need not make a [sketch] of the vulcanizer, but just the clamp itself.

(Witness does as requested.)

X Q. 79. Now please mark the sketch you first made, "Figure 1" and the sketch of the G-clamp "Figure 2."

(Witness does as requested.)"

The sketches made by the witness are offered in evidence and marked "Defendant's Exhibit, McCormish Sketches."

In Exhibit E three different designs of vulcanizer are shown. Sketches 2 and 3 relate to the same design, but are not intended to illustrate pins as they showed rings; on August 19, 1911, we figured that rings would be much easier to make than pins in casting or in machining up. Nothing was said as to the number of pins that would be required.

I am no longer associated with Mr. Adamson in business, but am still friendly with him, I recall that this sketch, Exhibit E, was made prior to Labor Day, 1911, because Mr. Adamson had given me the sketch at East Palestine to get this work done, which I had neglected to do, and I remember distinctly his coming to Akron on Labor Day bringing his wife and the baby along. I recall this was Labor Day because during the street parade, the baby would cry every time a band came by, and that date was fixed in my mind as being Labor Day, and Mr. Adamson taking the sketch back with him on that date; and I know it was a week or two before that date that I had originally gotten the sketches.

Respecting the pattern made by Dietrick & Brunswick, I recall it otherwise because it was made out of hard wood, out of Mahogany, ordinarily is only made out of pine or pattern lumber. This was made out of mahogany because it was a little thin pattern and very light, and you couldn't work a thin pattern out of soft wood. The whole pattern was made out of mahogany. I further identify the order of Dietrick & Brunswick, because order No. 381 specifically states "blue print 898" which is the number of the tracing or blue print which patterns were made from, and that number was placed on the order at the same time that the order was made out, and is in my hand writing.

Redirect examination:

The first time that my attention was called to this sketch of August 19, 1911, with any request that I bear it in mind for possible

138 future testimony, was in the fore part of January, 1912, and it was called to my attention by Mr. Percy B. Hills at Mr.

Adamson's office in East Palestine, who said that I should particularly remember the sketch and the date, which I did. At that time I looked up the matter of the memorandum on the back of Exhibit E to see that it confirmed that date. This reference to me by Mr. Hills was some time early in January, 1912, at which time the matter was fairly fresh in my mind, and it was called to my attention on account of rumors that we had at that time that some one else was applying for a patent on the same article; and that in case any trouble might arise, it would be necessary for me to remember this sketch and the dates, and the time pertaining to that date.

Recross-examination:

At the time Mr. Hills called my attention to this sketch in January, 1912, I noticed that the sketch was dated August 19th, and he wanted to be reasonably sure that that was the date and I took the precaution to connect the other affairs that were marked on the back of the sketch at that time, and the matters marked on the back of the same were written in pencil and were placed there on August 19th. Exhibit F is dated October 6, 1911, and that date was put on there on October 6, 1911, by Mr. Adamson in my presence. I can recall that because he made the sketch and I brought it up to Akron with me, and immediately had a tracing made after giving the pattern maker a sketch, and I know that the tracing was finished on the 10th. That would mean that the drawing would have to be made along about October 6th. That date October 6, 1911, is in Mr. Adamson's hand writing.

(*Approval of Statement of Evidence and Amendments Thereto.*)

The foregoing Def't's summary and Compl't's amendments are approved as an entirety this Sept. 15" 1914.

(Signed)

DAVID P. DYER, Judge.

(*Notice to Appellant of Motion to Amend Statement of Evidence Offered by Appellant, etc.*)

To David C. Gilliland, the above named defendant, or James A. Carr and T. Percy Carr, his solicitors of record:

Please take notice that at the hearing before the Hon. D. P. 139 Dyer in the city of St. Louis, said hearing being for the purpose of obtaining the approval of the condensed statement of defendant filed on behalf of appellant, the appellee will through his counsel move the court to amend the condensed statement of the evidence offered by appellant in the particulars set forth in the document presented herewith, of which a copy has been duly served upon counsel for the appellant.

PERCY B. HILLS,
DOUGLAS W. ROBERT,
Solicitors for Appellant.

Service of above and statement acknowledged Aug. 15, 1914.

JAMES A. CARR,
T. PERCY CARR,
For Defendant.

(*Order in re Transmission of Physical Exhibits.*)

Upon motion of complainant, it is hereby ordered that the Clerk of this Court be and hereby is authorized and directed to transmit to the Clerk of the Court of Appeals for the Eighth Circuit all physical exhibits introduced in evidence in said cause on the hearing hereof, said exhibits to remain subject to the control of the said Court of Appeals.

DAVID P. DYER, *Judge.*

Received a copy of the above this 31st day of July 1914.

HUGH K. WAGNER,
Solicitor for Appellee.

Endorsed: Filed Sept. 30th, 1914. W. W. Nall, Clerk.

(*Clerk's Certificate to Transcript.*)

UNITED STATES OF AMERICA,
*Eastern Division of the Eastern
Judicial District of Missouri, ss:*

I, W. W. Nall, Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the cause therein entitled wherein Cecil F. Adamson is Complainant and David C. Gilliland, doing business under the name of Gilliland Auto Supply Company, is Defendant, No. 4198, together with all things of and concerning the same, save as restricted by the preceipe for transcript therein set forth, as fully as the same remain on file and of record in said cause in my office; and that the original Citation is hereto attached and herewith returned.

In witness whereof, I hereunto set my name and affix the seal of said District Court, at office in the City of St. Louis, in said Division of said District this first day of October, 1914.

[Seal U. S. Dist. Court, East. Div. of the East Jud. Dist. of Missouri.]

W. W. NALL,
Clerk of said District Court,
By IRWIN MITCHELL, *Deputy.*

Filed Oct. 1, 1914. John D. Jordan, Clerk.

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141 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4337.

DAVID C. GILLILAND, Appellant,
vs.
CECIL F. ADAMSON.

The Clerk will enter my appearance as counsel for the Appellant

JAMES A. CARR.
T. PERCY CARR.
A. M. HOLCOMBE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 3, 1914.

(*Appearance of Counsel for Appellee.*)

The Clerk will enter my appearance as counsel for the Appellee

PERCY B. HILLS,
McGill Bldg., Washington, D. C.
DOUGLAS W. ROBERT,
1320 New Bank Commerce Bldg., St. Louis.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 2, 1914.

(*Order of Submission.*)

May Term, 1915.

MONDAY, May 31, 1915.

This cause having been called for hearing in its regular order, argument was commenced by Mr. T. Percy Carr for appellant, continued by Mr. Percy B. Hills for appellee and concluded by Mr. T. Percy Carr for appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

143

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1915.

No. 4337.

DAVID C. GILLILAND, Appellant,
vs.
CECIL F. ADAMSON, Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

Mr. T. Percy Carr (Mr. James A. Carr and Mr. Amasa M. Holcombe, were with him on the brief), for appellant.

Mr. Percy B. Hills (Mr. Douglas W. Robert, was with him on the brief), for appellee.

Before Hook, Circuit Judge, and Elliott and Youmans, District Judges.

YOUNMANS, *District Judge*:

This is an appeal from a decree restraining and enjoining appellant, his agents, workmen and employees, "from further making, using or selling or causing to be made, used or sold, directly or indirectly any portable vulcanizing device for tires contained in or embodying the invention patented in letters patent No. 1,057,911 dated April 1, 1913."

The only question involved is one of fact and that is whether the vulcanizing device patented by appellee was made, used and sold by appellant prior to appellee's alleged invention.

The decree in the case of Adamson v. Shaler, decided in the United States District Court for the Eastern District of Wisconsin was introduced by appellee. He also introduced the testimony of appellant in that case, together with the opinion of the District Judge. The decree in that case, following the opinion, sustained the patent and enjoined Shaler from using or selling the device which was adjudged an infringement.

144 The testimony of appellee shows that the idea embodied in the patent assumed shape in his mind on the 19th day of August, 1911, on which day he made a drawing of the different parts constituting the vulcanizer, the subject of his patent. The appellant introduced testimony to the effect that as early as August 7, 1911, he had caused vulcanizer castings to be made in practically the same form as those set out in appellee's application for a patent; and that prior to the 19th day of August of that year appellant had sold vulcanizers embodying all the elements of appellee's patent. That testimony is not disputed in any essential particular. It contains no inherent improbabilities.

The lower court held that it was bound by the decree of the United States District Court for the Eastern District of Wisconsin rendered in another case.

The parties were entitled to a judgment based upon the facts as they were developed in this case. Those facts demonstrated beyond a reasonable doubt that the appellant used and sold a vulcanizer embodying all the features contained in appellee's patent, not only before the patent was issued, but even before the idea became definitely formed in appellee's mind.

Therefore, the decree of the lower court must be reversed with direction to dismiss appellee's bill.

Filed October 11, 1915.

145

(Decree.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1915.

MONDAY, October 11, 1915.

No. 4337.

DAVID C. GILLILAND, Appellant,
vs.
CECIL F. ADAMSON.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that David C. Gilliland have and recover against Cecil F. Adamson the sum of — Dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said District Court with directions to dismiss the bill of complaint.

October 11, 1915.

146 United States Circuit Court of Appeals, Eighth Circuit.

No. 4337.

DAVID C. GILLILAND, Defendant-Appellant,
vs.
CECIL F. ADAMSON, Complainant-Appellee.

Petition for Rehearing.

After carefully examining the opinion of the Court, we think that with propriety we may ask, and, therefore, do ask, the Court to consider whether this case be not one in which it be proper to grant a rehearing to the appellee, on the following grounds:

1. Because the Court erred in failing to give consideration to the significance of the fact that appellant's Exhibits 10 and 15 were replicas of appellee's vulcanizers marketed in November, 1911, unquestionably because of the failure of the Clerk of the Court below to send up the physical exhibits as ordered.

In the absence of the exhibits it was impossible to bring 147 this fact properly before this Court. This Court has failed to give the proper weight to this most significant fact so clearly pointed out in the brief of appellee (pages 20 to 23). In truth, this fact, taken with the surrounding circumstances, is conclusive that appellant's allegation is inherently improbable.

2. Because the Court erroneously holds that prior to the 19th day of August, 1911, the date on which the testimony shows that the idea embodied in the patent was disclosed by appellee, appellant had "sold" vulcanizers embodying all the elements of appellee's patent.

The appellant, Gilliland, nowhere, as shown by the record, makes any claim to having "sold" a single one of these vulcanizers during 1911, except one to Max Huhle, which he says was sold some time in September (Transcript, page 97). This is the date also given by Huhle, who fixes the time as some time in the middle of September (Transcript, page 91).

3. Because the Court erroneously holds that the lower court ruled that it was bound by a prior decree of the United States District Court for the Eastern District of Wisconsin, rendered in another case.

That the lower court gave full consideration to the evidence is shown by the language of its opinion as follows (Transcript, page 124):

"There are some matters in this new testimony that do not favorably impress themselves. I know that a great many witnesses were examined and it is a singular thing that many of these molders and employes who were there at the time told virtually the same story one as the other, and each recollects the time about the same way each one of the others recollects it."

148 Again, in the lower court pronounced a most complete judgment, in the following language (Transcript, page 124):

"My own judgment is that had all of this new testimony been before Judge Geiger at the time he decided the case, it is not of such character as would change Judge Geiger's opinion."

4. Because the Court has failed to give due weight to the decision below on a question of fact after a trial in open court.

The quotations of the court below, *supra*, in setting forth the second ground of error, disclose that the court below did weigh the evidence and did pass upon it. Such being the fact, the doctrine laid down by the Supreme Court in *Davis v. Schwartz*, 155 U. S. 636, that a finding of fact dependent upon the credibility of witnesses "must be treated as unassailable" is applicable directly to this case.

* * * * *

Respectfully submitted.

PERCY B. HILLS,
Attorney for Appellee.

DOUGLAS W. ROBERT,
Of Counsel.

I, Percy B. Hills, of counsel for the appellee herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

PERCY B. HILLS, *Counsel.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 26, 1915.

149 (*Order Denying Petition for Rehearing.*)

December Term, 1915.

SATURDAY, January 8, 1916.

This cause came on this day to be heard upon the petition for rehearing, filed by Counsel for Appellee.

On consideration whereof, it is now here ordered by this Court that said petition for a rehearing of this cause, be, and the same is hereby, denied.

January 8, 1916.

(*Motion to Stay Mandate Pending Application to Supreme Court U. S. for Certiorari.*)

Now comes Cecil F. Adamson, Appellee in the above entitled cause and moves the court to stay the mandate herein, for the reason that Appellee intends to, and will file an application for a writ of certiorari to the Supreme Court of the United States. That on December 7th, 1915, Appellee herein duly filed in this court a notice

that in the event his motion for a rehearing was overruled he would apply to the Supreme Court for a writ of certiorari.

Respectfully submitted,

PERCY B. HILLS,
DOUGLAS W. ROBERT,
Solicitors for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 8, 1916.

*Order Staying Mandate Pending Application to Supreme Court
U. S. for a Writ of Certiorari.)*

December Term, 1915.

SATURDAY, January 8, 1916.

Upon consideration of the motion of counsel for appellee for an order staying the mandate herein, it is now here ordered by this Court, that the mandate in this cause be, and the same is hereby, stayed for a period of sixty days, from and after this date, pending an application to the Supreme Court of the United States for a writ of certiorari in this cause, on condition, however, that said petition for certiorari be presented and submitted to the said Supreme Court within said period of sixty days.

January 8, 1916.

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(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed, pursuant to the stipulation of the parties, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein David C. Gilliland is Appellant and Cecil F. Adamson is Appellee, No. 4337, is full, true and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of February, A. D. 1916.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled Feb. 15, 1916. John D. Jordan.]

151 United States Circuit Court of Appeals for the Eighth Circuit

No. 4337.

DAVID C. GILLILAND, Appellant.

v.

CECIL F. ADAMSON, Appellee.

Stipulation.

It is hereby stipulated and agreed by and between counsel for the respective parties to the above appeal that the certified transcript of record now on file in the United States Supreme Court shall be taken as a return of the writ of certiorari issued by the Supreme Court on March 16, 1916.

PERCY B. HILLS,

DOUGLAS W. ROBERT,

Solicitor for Adamson.

CARR & CARR,

Solicitors for Gilliland.

(Endorsed:) No. 4337. David C. Gilliland, Appellant, vs. Cecil F. Adamson. Stipulation as to return to writ of certiorari from Supreme Court, U. S. Filed Apr. 6, 1916, John D. Jordan, Clerk

152 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which David C. Gilliland is appellant, and Cecil F. Adamson is appellee, No. 4337, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Eastern District of Missouri, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of

Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

153 Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of March, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

154 *Return to Writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of David C. Gilliland, Appellant, vs. Cecil F. Adamson, No. 4337, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixth day of April, A. D. 1916.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled Apr. 6, 1916. John D. Jordan.]

[Endorsed:] File No. 25,161. Supreme Court of the United States, October Term, 1915. No. 878. Cecil F. Adamson vs. David C. Gilliland. Writ of Certiorari. Filed Apr. 6, 1916. John D. Jordan, Clerk.

155 [Endorsed:] File No. 25,161. Supreme Court U. S., October term, 1915. Term No. 878. Cecil F. Adamson, Petitioner, vs. David C. Gilliland. Writ of certiorari and return. Filed April 8, 1916.

NO. C [REDACTED] 8015

SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE PETITION OF OSCAR
E. ADAMSON FOR A WRIT OF CERTIORARI
DIRECTED TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT
REGARDING THE DENIAL OF THE PETITION FOR A WRIT OF
CERTIORARI FILED BY OSCAR E. ADAMSON, COMPLAINANT, vs. DAVID C.
CHILLAND, DEFENDANT.

PETITION FOR WRIT OF CERTIORARI AND PETITION FOR
INTERLOCUTORY INJUNCTION

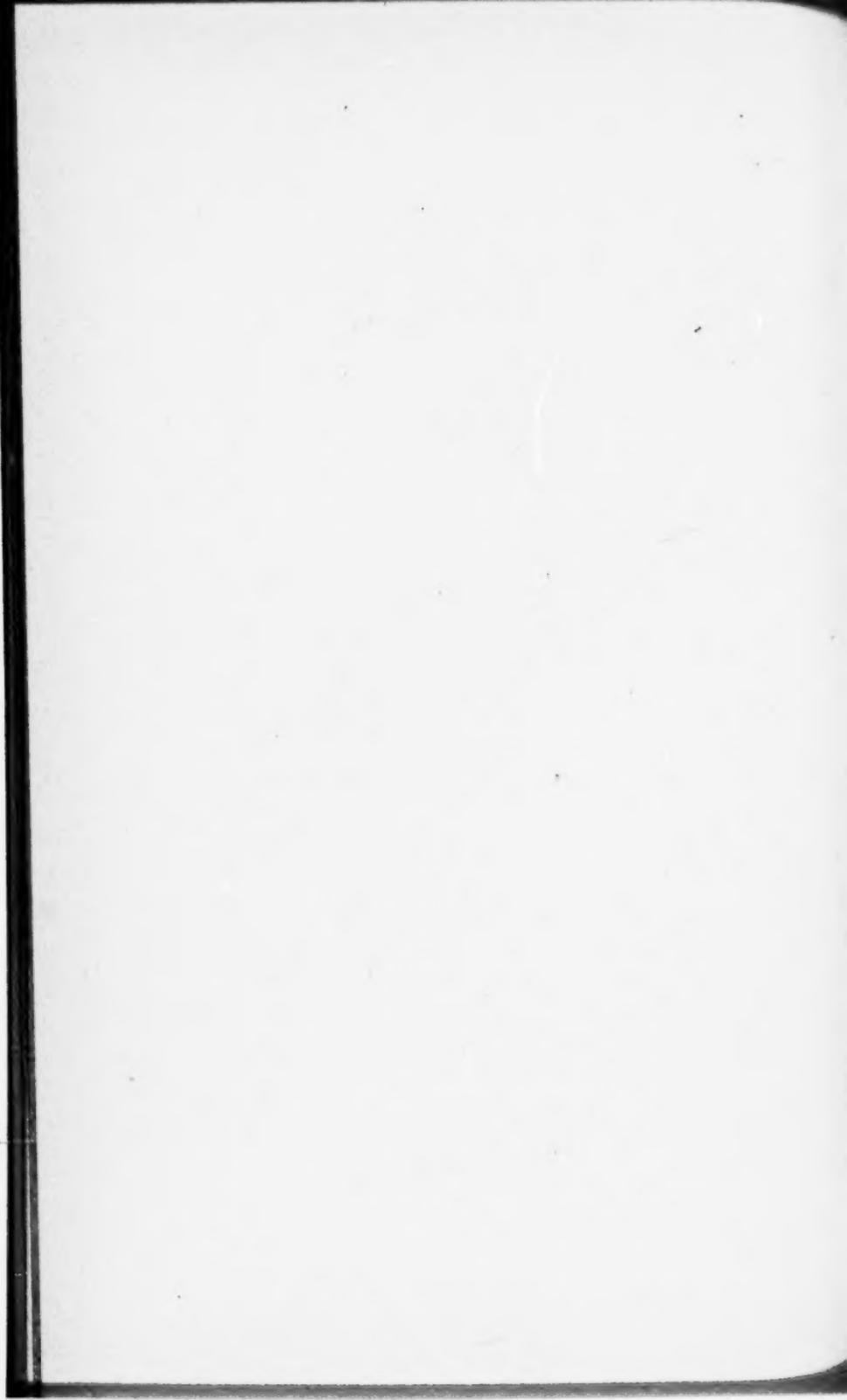
BERNIE B. HILLS
DOUGLAS W. ROBERT
Counsel for Relator

BERNIE B. HILLS
Counsel

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(30489)



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

IN THE MATTER OF THE PETITION OF CECIL F. ADAMSON FOR A WRIT OF CERTIORARI, DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, TO BRING BEFORE THIS COURT THE CASE OF CECIL F. ADAMSON, COMPLAINANT, *vs.* DAVID C. GILLILAND, DEFENDANT.

NOTICE.

To DAVID C. GILLILAND and JAMES A. CARR and T. PERCY CARR, Esqs., *Roe Building, St. Louis, Mo., his Counsel:*

Please take notice that upon a copy of the transcript of the record herein, and upon the accompanying petition of Cecil F. Adamson, we shall move before the Supreme Court of the United States, in the city of Washington, District of Columbia, on Monday, the sixth day of March, 1916, at the opening of the court on that date, or as soon thereafter as counsel may be heard, for a *writ of certiorari*, directed to the Circuit Court of Appeals for the Eighth Circuit, to bring before the Supreme Court of the United States the case of Cecil F. Adamson, complainant, *vs.* David C. Gilliland, defendant, recently decided by the said United States Circuit

Court of Appeals for the Eighth Circuit, and for such further relief as in the premises may be just.

Dated at Washington, February 19, 1916.

PERCY B. HILLS,
DOUGLAS W. ROBERT,
Counsel for Petitioner.

PERCY B. HILLS,
Of Counsel for Petitioner.

We acknowledge service of the foregoing notice and of the petition and brief accompanying the same, this 21st day of February, 1916, and agree that the service of said notice, petition, and brief is timely.

Counsel for Defendant.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1915.

IN THE MATTER OF THE PETITION OF CECIL F. ADAMSON FOR A WRIT OF CERTIORARI, DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, TO BRING BEFORE THIS COURT THE CASE OF CECIL F. ADAMSON, COMPLAINANT, *vs.* DAVID C. GILLILAND, DEFENDANT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Cecil F. Adamson, respectfully shows to this Court as follows:

(1.) Your petitioner brought a suit in equity in the United States District Court for the Eastern District of Wisconsin, against the C. A. Shaler Company, of Waupon, Wisconsin, for alleged infringement of his Letters Patent No. 1,057,911, for an improvement in Portable Vulcanizing Devices for Tires, granted to him April 1, 1913.

(2.) The said United States District Court, on December 17, 1913, upon full proofs taken or read in open court, decided said letters patent valid and infringed (Opinion, *post*, pp. 7-10).

(3.) No appeal from said decree was filed, and on March 30, 1914, with the consent of the defendant, a final decree declaring said letters patent valid, permanently enjoining the defendant, and fixing a sum certain to cover the damages and profits, was signed, thereby finally disposing of said suit (Decree, *post*, pp. 11-12).

(4.) Your petitioner also brought suit in equity in the United States District Court for the Eastern District of Missouri against the defendant herein, David C. Gilliland, for alleged infringement of said letters patent hereinbefore referred to.

(5.) The said United States District Court, on January 24, 1914, after full proofs taken in open court, also decreed said letters patent valid and infringed (Opinion, *post*, pp. 13-14).

(6.) The defendant, Gilliland, appealed from the decree of said District Court to the United States Circuit Court of Appeals for the Eighth Circuit.

(7.) Said Circuit Court of Appeals, on the 11th day of October, 1915, adjudged that the defendant produced the device of the patent in suit before it was invented by your petitioner, and reversed the decision of said District Court (Opinion, *post*, pp. 15-16):

(8.) In both of the suits hereinbefore referred to the defense which prevailed with the Circuit Court of Appeals for the Eighth Circuit, viz., that the defendant, Gilliland, made the device of the patent in suit before it was invented by your petitioner, was presented in the strongest possible manner, and was rejected by both district courts.

(9.) By reason of said ruling of the Circuit Court of Appeals for the Eighth Circuit, the letters patent in suit are invalid in said Eighth Circuit, but are valid in every other circuit of the United States, and particularly in the Seventh Circuit, and vulcanizers heretofore enjoined in the Seventh Circuit freely may be used and sold by the said defendant in the Seventh Circuit, and defendant threatens and intends to use and sell said vulcanizers in the Seventh Circuit.

(10.) Your petitioner avers, therefore, that if said de-

cision of the Circuit Court of Appeals is permitted to stand without review, the letters patent in question become practically of no value to your petitioner, notwithstanding that said letters patent have been held good and valid in a final decree, and without appeal, in another circuit.

(11.) Your petitioner further avers that the Circuit Court of Appeals for the Eighth Circuit committed grievous error, both in law and in fact, in holding that the letters patent in suit was invalid, to the confusion of the law, and to the great injury of your petitioner.

(12.) The validity of the letters patent in suit has been acquiesced in in other suits, notably in *Cecil F. Adamson vs. J. Everet Inmann and George Inman*, trading under the firm-name of The Victor Inner Tire & Rubber Company, in the Southern District of Ohio, western division; and in *Cecil F. Adamson vs. Samuel Lazarus*, in the Northern District of Ohio, eastern division, wherein final decrees against the several defendants have been duly signed and entered (Decrees, *post*, pp. 18-20).

A certified copy of the transcript of record as filed in the Circuit Court of Appeals for the Eighth Circuit, and all proceedings in said court, is filed herewith as a part of this petition.

Your petitioner therefore prays that this Honorable Court will grant its writ of certiorari, directed to the United States Circuit Court of Appeals for the Eighth Circuit, requiring that the record of said cause in said court be certified to this Honorable Court for its review and determination.

CECIL F. ADAMSON,
By PERCY B. HILLS,
His Attorney.

PERCY B. HILLS,
DOUGLAS W. ROBERT,
Of Counsel.

DISTRICT OF COLUMBIA, ss:

Percy B. Hills, being duly sworn, deposes and says: I am of counsel for the above petitioner; I have read the foregoing petition and know the contents thereof, and aver that the facts therein set forth are true to the best of my knowledge and belief.

Subscribed and sworn to before me this 19th day of March, 1916.

I certify that, in my opinion, the above petition is well grounded in matter of law and proper to be heard.

Of Counsel for Petitioner.

OPINION.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF WISCONSIN.

CECIL F. ADAMSON, *Complainant,*
vs.

CLARENCE A. SHALER and F. E. JONES, *Copartners, Doing Business under the Firm Name and Style of C. A. Shaler Company, Defendants.*

GEIGER, J.:

The case has been presented in a way that is rather enlightening in the way of endeavoring to reduce my conclusions to a formal opinion, but I think I will announce my conclusions now.

I am satisfied that so far as the first defence that is asserted is concerned, there is nothing in the prior art of patents, and I do not believe there is anything in the prior arts structures that discloses the Adamson structure as he has presented it at this trial. Of course, he has the benefit of a presumption that the Patent Office has accorded him. I think that presumption is strongly fortified by a detailed examination of the prior art structures, both the patent structures and others, as they have been exhibited here in court.

I do not think there is any doubt but that prior to the appearance of Mr. Adamson on the field of exploration the idea was known that a vulcanizing process could be carried on through the use of a gasoline liquid enclosed in structures similar to those which have been exhibited here, the Inman structure and the Gilliland ladle; but there is a remarkable difference in structure alone between any of these and the structure of the Adamson patent. I haven't any doubt that the Patent Office regarded the disclosure made in his applica-

tion as being entirely novel, and that his patent was readily accorded to him because of the very patent differences between all prior art structures and his; and I believe that the evidence which has been produced here respecting the receipt and acceptance of the structure in the automobile trade fortifies very strongly the presumption which the Patent Office accorded him. It may be true, as suggested by counsel, that the moment the Adamson structure was disclosed it was accepted by everyone because of the want of knowledge; that all those interested in structures of that kind and in some structures that would discharge the function immediately realized that it contained nothing new, and that it was a mere fortuitous event—the disclosure of the Adamson structure—which they were at liberty to adopt; but I think the contrary view is the one which, under the law, must be taken; that the ready acceptance of it, the eagerness to appropriate in one form or a closely allied form is very cogent evidence of its novelty; and I am clear that the patent must be sustained on that ground.

I do not believe that it is anticipated by the Inman structure, and I will pass that as being covered by what I have said.

The feature of the case disclosed by the claim of the defendant that Gilliland was the inventor, if there was invention, of this structure, is to my mind a very interesting one, and affords rather a wide opportunity, a large opportunity, for discussion of the inferences properly to be drawn. In the giving of Mr. Gilliland's testimony, I was impressed, and that impression, and the conviction, has not been shaken by anything which has been said here in argument respecting the improbability of its truth. As I suggested, in interrupting counsel, it may be that if Mr. Adamson's testimony is taken and analyzed closely there can be many conjectures indulged in respecting the improbability of the shaping of events; but his testimony as a whole is clear and, as I regard it, straightforward and not inherently improbable. I did

not get the impression from his testimony that the whole idea which is embodied in his patent, and which is disclosed in the sketch which is offered in evidence, and his original disclosure to the witness McCormish, that it all happened in the course of a few minutes; but I think a fair construction of his testimony, as well as that of McCormish, is that the matter had been under discussion. Adamson's profession is such, his daily activities were such, as would equip him fairly well to approach a problem of this kind. He had a fund of information, some learning on the subject, which, as between he and Gilliland, puts him in a position where what he said respecting his achievements can be quite readily accepted and without suggestion of inherent improbability.

Mr. Gilliland testifies that he first got the idea of his structure about July 25, 1911. A suggestion was made to him by the witness Huber; that he at once went to his home, where he had a hand lathe, and turned out practically the structure as here introduced in evidence to the court. I do not believe that that testimony can be accepted to the exclusion of a reasonable doubt. I believe Mr. Gilliland's own activities long prior to this time in the way of using the ladle, as he has testified, created a situation where we would naturally expect he would make a little fuller disclosure as to what he did. He is not a professional man. I should say that as between him and Mr. Adamson he was at a disadvantage in the development of any idea, whether it was his own, or suggested to him. That between the date which he gives, July 25, and August 2, he should perfect this and ask that his statement be accepted without any corroboration whatever in the way that those statements are usually corroborated, by the production of drawings, models and more detailed description of the failures which all men must have in the development of an idea, cannot and should not be accepted to the exclusion of a reasonable doubt as against the story given by the complainant here. That I am unwilling to do, and I find against the defendant upon that ground also.

This leaves merely the question as to infringement.

I believe the defendant's structure infringes the complainant's. I think the basic idea of the complainant's structure is substantially incorporated, and whatever change may have been brought about by the use of a cap I do not believe can in any way relieve the defendants from the consequences of adopting the basic ideas of the complainant's patent. There will be a decree for the complainant.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF WISCONSIN.

CECIL F. ADAMSON, *Complainant,*
vs.

CLARENCE A. SHALER and F. E. JONES, *Copartners, Doing Business under the Firm Name and Style of C. A. Shaler Company, Defendants.*

FINAL DECREE.

This cause came on to be heard in open court at the October term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

1. That letters patent of the United States No. 1,057,911, granted under date of April 1, 1913, to Cecil F. Adamson for Portable Vulcanizing Device for Tires, is in all respects good and valid in law, and that the title thereto is duly vested in the complainant.
2. That the defendants have infringed upon the exclusive rights of the complainant under said letters patent, by making, using and selling Portable Vulcanizing Devices for Tires embodying the form and construction described in said letters patent, and particularly set forth and claimed in the first, second, third, fourth and fifth claims of said letters patent.
3. That an injunction forthwith issue under the seal of this court, permanently enjoining and restraining the defendant, Clarence A. Shaler, and F. E. Jones, copartners, doing business under the firm and style of C. A. Shaler Company, and also their agents, workmen and employees, or their successors, from further making, using or selling, or causing to be made, used or sold, directly or indirectly, any Portable Vulcanizing Devices for Tires containing or em-

bodying the invention sold as aforesaid patented to the complainant in said letters patent No. 1,057,911.

4. The parties having agreed upon the sum of two thousand dollars (\$2,000.00) as damages and profits, and defendants having paid the same, it is ordered that the master be discharged.

5. That the complainant recover from the defendants his costs, charges and disbursements in this suit to be taxed and have execution therefor.

Enter.

(Signed)

F. A. GEIGER,
District Judge.

Filed March 30, 1914.

[Endorsed:] No. 427 Civ. Doc. United States District Court, Eastern District of Wisconsin. Cecil F. Adamson, complainant, vs. Clarence A. Shaler and F. E. Jones, co-partners, doing business under the firm name and style of C. A. Shaler Company, defendants. Certified copy. Final Decree. Filed Mar. 30, 1914. F. C. Westfahl, clerk.

OPINION.

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE EASTERN DIVISION OF THE
EASTERN JUDICIAL DISTRICT OF MISSOURI.

In Equity. No. 4198.

CECIL F. ADAMSON, *Complainant,*

vs.

DAVID C. GILLILAND, *Doing Business under the Name of*
Gilliland Auto Supply Company, Defendant.

St. Louis, January 24, 1914.

DYER, J.:

In this case, that was before a judge of the United States Court in Milwaukee, it is claimed here that Mr. Gilliland was a witness; that his deposition was taken and that he was examined orally in court.

All of his claim as to when this work was done by him was before Judge Geiger. Judge Geiger has decided the case not only upon the testimony given before him, but with the depositions of Mr. Gilliland and Mr. Huber before him. With the fact that this defendant was examined at length in that particular case (and he was examined along the lines that follow here, that matter being before Judge Geiger) he decided in favor of the validity of this patent and held not only that the presumption of law that arises in favor of the action of the parties giving the patent was controlling in a measure, but was convinced by the testimony he heard that this was a patented invention and that the patent was granted to this complainant, notwithstanding the claim made in the testimony of Mr. Gilliland.

Certain other testimony was introduced here which I am asked to say supplements Mr. Gilliland's testimony, and had

that been before Judge Geiger as it is now before this court a different ruling might have been made by Judge Geiger. I am not going into the question of this additional evidence, as it will serve no good purpose. There are some matters in this new testimony that do not favorably impress themselves. I know that a great many witnesses were examined and it is a singular thing that many of these molders and employees who were there at the time told virtually the same story one as the other, and each recollects the time about the same way each one of the others recollects it. As I have said, I am not going into a discussion of that. My own judgment is that had all of this new testimony been before Judge Geiger at the time he decided the case, it is not of such character as would change Judge Geiger's opinion.

My opinion, therefore, is that following the rule that has been long adopted and followed in the various courts in this country, where a claimant of a particular device is examined before the court, it becomes my duty as a judge to follow the decision of the court in the first instance. Believing that it is my duty to follow the decision of Judge Geiger, and knowing, as the record shows, that both Mr. Gilliland and Mr. Huber were examined as witnesses before that court, either orally or by deposition, I cannot say that this testimony now introduced here would have changed Judge Geiger's opinion at all.

The complainant is entitled to recover in this action. Let a decree be entered in accordance with the prayer of the bill.

OPINION.

No. 4337.

UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.DAVID C. GILLILAND, *Appellant,**vs.*CECIL F. ADAMSON, *Appellee.*Appeal from the District Court of the United States for the
Eastern District of Missouri.

Submitted May 30, 1915.

Decided October 11, 1915.

Before HOOK, Circuit Judge, and Elliott and Youmans,
District Judges.YOUMANS, *District Judge:*

This is an appeal from a decree restraining and enjoining appellant, his agents, workmen, and employees, "from further making, using, or selling, or causing to be made, used, or sold, directly or indirectly, any portable vulcanizing device for tires contained in or embodying the invention patented in letters patent No. 1,057,911, dated April 1, 1913." The only question involved is one of fact, and that is whether the vulcanizing device patented by appellee was made, used, and sold by appellant prior to appellee's alleged invention.

The decree in the case of Adamson *vs.* Shaler, 208 Fed., 566, decided in the United States District Court for the Eastern District of Wisconsin, was introduced by appellee. He also introduced the testimony of appellant in that case, together with the opinion of the district judge. The decree

in that case, following the opinion, sustained the patent and enjoined Shaler from using or selling the device, which was adjudged an infringement.

The testimony of appellee shows that the idea embodied in the patent assumed shape in his mind on the 19th day of August, 1911, on which day he made a drawing of the different parts constituting the vulcanizer, the subject of his patent. The appellant introduced testimony to the effect that as early as August 7, 1911, he had caused vulcanizer castings to be made in practically the same form as those set out in appellee's application for a patent, and that prior to the 19th day of August of that year appellant had sold vulcanizers embodying all the elements of appellee's patent. That testimony is not disputed in any essential particular. It contains no inherent improbabilities.

The lower court held that it was bound by the decree of the United States District Court for the Eastern District of Wisconsin rendered in another case. The parties were entitled to a judgment based upon the facts as they were developed in this case. Those facts demonstrated beyond a reasonable doubt that the appellant used and sold a vulcanizer embodying all the features contained in appellee's patent, not only before the patent was issued, but even before the idea became definitely formed in appellee's mind.

Therefore the decree of the lower court must be reversed, with direction to dismiss appellee's bill.

DISTRICT COURT OF THE UNITED STATES, SOUTH-
ERN DISTRICT OF OHIO, WESTERN DIVISION.

TUESDAY, June 30, 1914.

Present: Honorable Howard C. Hollister, district judge.

In Equity. No. 2191.

CECIL F. ADAMSON

v/s.

J. EVERETT INMAN and GEORGE INMAN, *Trading under the Firm Name of The Victor Inner Tire and Rubber Company.*

FINAL DECREE.

This cause coming on to be heard on this 30th day of June, 1914, upon consideration thereof, the parties having agreed upon the entry of a final decree, it is ordered, adjudged, and decreed:

(1) That letters patent of the United States granted April 2, 1912, No. 1,022,289, to Cecil F. Adamson, complainant herein, for new and useful improvements in a tire-vulcanizing repair apparatus, is, as between the parties, in all respects good and valid in law as to claims 1, 2, 3, and 4 thereof; and that letters patent of the United States granted April 1, 1913, No. 1,057,911, to Cecil F. Adamson, complainant herein, for new and useful improvements in a portable vulcanizing device for tires, is, as between the parties, in all respects good and valid in law as to claims 1, 2, 3, 4, 5, 7, 8, and 9 thereof.

(2) That Cecil F. Adamson was the true and original inventor thereof, and has a good and sufficient title thereto, and is entitled to the exclusive rights therein, including

the right to recover for any and all claims and demands for profits and damages arising from infringement of the letters patents aforesaid.

(3) That defendants, J. Everett Inman and George Inman, trading under the firm name of the Victor Inner Tire & Rubber Company, copartners, having their principal place of business in the city of Dayton and State of Ohio, have infringed upon said letters patents and upon the exclusive rights of complainant thereunder by selling vulcanizers made according to and containing the inventions and improvements described in said letters patents and pointed out in claims 1, 2, 3, and 4 of letters patent 1,022,289 and in claims 1, 2, 3, 4, 5, 7, 8, and 9 of letters patent 1,057,911, as evidenced by the open-faced vulcanizers filed herewith and marked respectively Exhibits A, B, and C.

(4) That defendants, J. Everett Inman and George Inman, trading under the firm name of the Victor Inner Tire & Rubber Company, their officers, agents, attorneys, servants, and workmen, and each and every one of them, be and they are hereby perpetually enjoined and restrained from further infringement of said letters patents Nos. 1,022,289 and 1,057,911, by making, using, vending, or causing others to make, use, or vend, within the United States or the territories or possessions thereof, vulcanizers containing or embodying the combinations of parts set forth in said letters patents and pointed out in claims 1, 2, 3, and 4 of letters patent 1,022,289 and in claims 1, 2, 3, 4, 5, 7, 8 and 9 of letters patent 1,057,911.

(5) The parties hereto having agreed regarding the complainant's claims for profits and damages, complainant here releases defendants from all claims for profits and damages, including all claims against purchasers of the aforesaid infringing vulcanizers heretofore sold by defendants; and de-

fendents having waived their right to an appeal from this decree, it is hereby so adjudged and decreed.

(6) It is further ordered, adjudged, and decreed that complainant recover from said defendants his costs in said suit, to be taxed by the clerk, and that complainant have execution therefor.

HOWARD C. HOLLISTER, *Judge.*

Approved:

R. J. McCARTY,
Solicitor for Defendants.

FINAL DECREE.

October Term, A. D. 1914, to wit, January 2, 1915.

Present: Honorable John H. Clarke, United States district judge.

No. 194. Equity.

CECIL F. ADAMSON

vs.

SAMUEL LAZARUS, Doing Business under the Name of Lazarus Manufacturing Company.

And now, this 31st day of December, 1914, the defendant having consented that a decree may be entered *pro confesso* in this cause that the letters patent sued upon are valid, that they are owned by the complainant, and that they have been infringed by the said defendant; and the parties hereto having made an agreement providing for the settlement of the costs of the suit and of all other obligations in connection therewith, the court thereupon

ADJUDGES AND DECREES that the allegations of the bill are, by reason of the consent of said defendant, confessed to be true, so far as this defendant is concerned.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the preliminary injunction issued in this cause on the 24th day of March, 1914, be and the same is made hereby perpetual for and during the remainder of the terms of said letters patent.

[Endorsed:] No. 194. United States District Court, Northern District of Ohio, Eastern Division. Cecil F. Adamson *vs.* Samuel Lazarus *et al.* Copy of Final Decree. Filed January 2, 1915. B. C. Miller, clerk.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1915.

IN THE MATTER OF THE PETITION OF CECIL F. ADAMSON FOR A WRIT OF CERTIORARI, DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, TO BRING BEFORE THIS COURT THE CASE OF CECIL F. ADAMSON, COMPLAINANT, *vs.* DAVID C. GILLILAND, DEFENDANT.

PETITION FOR WRIT OF CERTIORARI.

BRIEF.

This petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is asked in this case for the purpose of securing uniformity of decisions in the several circuits.

As shown by the petition, the patent in suit now stands as valid in the Seventh Circuit, after a full trial in open court in the Eastern District of Wisconsin, and as valid in the Sixth Circuit, as evidenced by the consent decrees entered in the Southern District of Ohio, Western Division, and in the Northern District of Ohio, Eastern Division, while in the Eighth Circuit, by reason of a finding of the Circuit Court of Appeals of said circuit, the patent in suit stands therein as invalid.

It is understood by counsel that it is the practice of this Honorable Court to issue its writ of certiorari in cases where there are conflicting decisions in the Circuit Courts of Appeals of two circuits.

Steward vs. American Lava Co., 215 U. S., 161.

It is true that the conditions in the present case differ slightly from those in the case above cited, in that there has been no finding of a Circuit Court of Appeals declaring the patent in suit to be valid, but this is through no fault or negligence of your petitioner. No opportunity has been offered your petitioner to submit the case to any Circuit Court of Appeals, through an appeal by your petitioner, for the reason that each finding in the district courts wherein proofs were taken has been in favor of the validity of the patent in suit, and in such other suits as have been brought no defense has been offered, and final decrees in favor of the patent in suit have been entered, either by consent or by reason of failure to defend. By reason of this state of facts, your petitioner has been precluded from bringing the question of the validity of the patent in suit before any of the Circuit Courts of Appeals, and inasmuch as the status of the patent in suit, by reason of the conflict of decisions that now exists, is the same as that which existed in *Steward vs. American Lava Co.*, *supra*, it is felt that this Honorable Court would be warranted in issuing its writ of certiorari.

Identity of Defense in Contested Suits.

In the trial of the suit, *Adamson vs. The Shaler Co.*, in the Eastern District of Wisconsin, the defense was offered, and was strongly urged, that the defendant in this suit, David C. Gilliland, produced the article embraced by the patent before the same was invented by your petitioner. Furthermore, while the testimony as to this alleged prior production was not taken in open court, but was taken before a special examiner under the statutes, this defendant, David C. Gilliland, was produced in open court and was personally interrogated by the trial judge, Honorable Ferdinand A. Geiger. As is seen from the opinion of the court in that case (*ante*, p. 8), the learned judge had no hesitancy in expressing his views as to the improbability of the truth of the story told by this defendant, in the following language:

"In the giving of Mr. Gilliland's testimony, I was impressed, and that impression, and the conviction, has not been shaken by anything which has been said here in argument respecting the improbability of its truth."

This decided expression of opinion by a United States District Judge, after an opportunity personally to interrogate the witness necessarily should have great weight, and in fact it is believed that had that case been taken to the United States Circuit Court of Appeals for the Seventh Circuit the finding of the district judge on this point would have been accepted as conclusive.

In *Davis vs. Schwartz*, 155 U. S., 636, Mr. Justice Brown, in stating the opinion of the court, held as follows:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. Stat., Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, *or upon the credibility of witnesses*, or so far as there is any testimony consistent with the finding, it must be treated as unassailable." (Italics ours.)

So, also, in *Kimberly vs. Arms*, 129 U. S., 512, the court held as follows:

"Its (the court's) findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given the evidence, or in the application of law, but not otherwise."

And this rule has been followed by the Circuit Courts of Appeals as shown by the ruling of the court in *Cook v. Robinson*, 194 F., 759, where the court stated as follows:

"The case having been tried without the intervention of a jury, the court's findings are conclusive of the questions of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made."

Prior to the adoption by the Supreme Court of the present new equity rules, testimony in equity cases was taken out of court, reduced to writing, and presented for the court's consideration, to find the facts as well as the law. Upon appeal the complete record was sent up and the Court of Appeals had the same opportunity and identically the same evidence as did the lower court upon which to predicate its judgment. But under the new equity rules, whereby causes are tried in open court and the witnesses are before the judge for him to pass in person upon their credibility, equity cases take on a different aspect, in that while the trial judge has every opportunity to pass upon the credibility of the witnesses, the Court of Appeals is even less able than heretofore properly to weigh the same, in that under the new rules the transcript is not even a complete reproduction of the evidence, but is a brief of the same.

It would seem to follow, therefore, that the rule as laid down in the opinions hereinbefore quoted now should apply with equal force to questions of fact in equity cases as passed upon by the trial judge. He alone confronts the witnesses, and he is far better able to pass upon their credibility than would be a court of appeals, wherein a mere brief of the evidence given is submitted for consideration. We feel, therefore, that by analogy to the practice in the consideration of a master's findings and by analogy to the practice in the consideration of findings of a lower court without reference to a

jury as to questions of fact, the findings of fact of the court below, where all the witnesses have appeared before him and have given their testimony orally, should not be questioned.

The trial of the suit against this defendant followed closely the conclusion of the trial in the eastern district of Wisconsin hereinbefore referred to, and the learned judge, the Honorable David P. Dyer, in the eastern district of Missouri, in rendering his opinion from the bench, and in commenting upon the fact that while the same defense as presented in this case had been made before Judge Geiger in the eastern district of Wisconsin, still certain additional evidence had been offered before Judge Dyer, expressed himself in respect to such additional evidence in the following language:

"My own judgment is that had all of this new testimony been before Judge Geiger at the time he decided the case, it is not of such character as would change Judge Geiger's opinion" (*ante*, p. 14).

It seems to follow, therefore, that with the positive opinion of two trial judges before whom the testimony of this defendant was presented orally, and who had opportunity to judge of his credibility through personal observation, the doctrine laid down in *Davis vs. Schwartz*, and the other citations hereinbefore referred to should prevail.

Error in Fact by Court of Appeals.

While possibly not pertinent to the present petition, still your petitioner feels constrained to call the attention of this honorable court to the fact that in its opinion in this cause the United States Circuit Court of Appeals for the Eighth Circuit committed a grievous error of fact in its finding as to the evidence. Said court held as follows:

"Those facts demonstrated beyond a reasonable doubt that the appellant used *and sold* a vulcanizer embodying all the features contained in appellee's

patent, not only before the patent was issued, but even before the idea became definitely formed in appellee's mind." (Italic type ours.)

This is a plain error of fact, in that neither in the testimony on behalf of the defendant Gilliland, nor in the brief presented by his counsel, is there any showing or contention that the defendant Gilliland sold one of said vulcanizers prior to the 19th day of August, 1911, the date when your petitioner first disclosed the invention to others. In fact, there is nothing in the evidence or in the brief for defendant claiming that the defendant Gilliland sold one of his vulcanizers before your petitioner had reduced the invention to practice.

Conclusion.

It is submitted that unless the errors of fact and law hereinbefore referred to are corrected by this Honorable Court great confusion to the public will result because of this conflict of decisions, and your petitioner will be unable to determine what his rights are in the premises. Over a million of these articles covered by the patent in suit have been sold in the last four years, and your petitioner, believing that his right to the patent had been determined, has invested large sums in exploiting the article before the public, all of which labor and expense has been rendered nugatory by the decision of the United States Circuit Court of Appeals for the Eighth Circuit, said decision leaving this defendant, Gilliland, under the decision of your Honorable Court, in Kessler *vs.* Eldred, 206 U. S., 285, free to sell the article in the seventh circuit notwithstanding that said patent has been held to be valid in said circuit.

Respectfully,

PERCY B. HILLS,
DOUGLAS W. ROBERT,
Counsel for Petitioner.



Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 396.

CECIL F. ADAMSON, Petitioner,

v.

DAVID C. GILLILAND.

STATEMENT OF THE CASE.

The sole point presented in this case is one of fact, to-wit: whether or not the defendant, Gilliland, has proved beyond a reasonable doubt that he produced a device embodying the subject-matter of the patent in suit prior to the date on which the petitioner, Adamson, first conceived the same and disclosed it to others.

The defendant admits making and selling devices identical with Figures 1 and 2 of the patent in suit, and admits that said device as used by him is within the scope of the various claims of the patent, except the defective claim 6 (Transcript, page 30).

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the defendant, Gilliland, had proved beyond a reasonable doubt that as early as August 7, 1911, he had produced vulcanizers embodying the construction of the patent in suit.

2. The Circuit Court of Appeals erred in holding

that the testimony given by Gilliland and by the witnesses on his behalf contained no inherent improbabilities.

3. The Circuit Court of Appeals erred in holding that the lower court had ruled that it was bound by a prior decree of the United States District Court for the Eastern District of Wisconsin, rendered in another case.

4. The Circuit Court of Appeals erred in holding that prior to the 19th day of August, 1911, the date on which the testimony shows that the idea embodied in the patent was disclosed by your petitioner, defendant had "sold" vulcanizers embodying all the elements of the petitioner's patent.

5. The Circuit Court of Appeals erred in failing to give due weight to the decision below on a question in fact after a trial in open court.

EVIDENCE ON BEHALF OF GILLILAND.

The story told by the defendant, Gilliland, as to the production of the vulcanizer cap, embodying the subject-matter of the invention in controversy, is somewhat remarkable. It appears from his own statement, given in open court, that during the latter part of July, 1911, one F. L. Huber, of St. Louis, practically suggested to him certain features of the device, that is to say, the application of the ears or lugs to the side of the cup and the disposal of the pins within the cup (Transcript, page 95). He then proceeded to reduce the invention to practice, taking about ten days to complete it, and on or about the 7th or 8th of August, 1911, had a number of articles cast from a pattern which he had made during these ten days, of which articles there are offered in evidence two samples (Defendant's Exhibits 10 and 15.) There is also in evidence a sample of the vulcani-

zer placed on the market by the petitioner, Adamson, in the early part of 1912 (Complainant's Exhibit 14), and it is a remarkable fact that the vulcanizer alleged to have been produced by Gilliland in August, 1911, is a replica of the vulcanizers afterwards produced by Adamson, except in one minor detail, that is to say, that the openings in the lugs on the sides of the cup face in opposite directions in the Gilliland exhibits, while in the Adamson exhibit they face in the same direction. As will be seen hereinafter from the testimony on behalf of Adamson, however, this disposition of the openings in the lugs by Adamson was adopted only after several hundred of his devices first had been placed on the market with the openings in the lugs **facing in opposite directions**. Now, it is inconceivable that two men even working along the same line and with the same object in view, could produce identically the same casting, each without knowledge of the other device. There is an irresistible conclusion either that Adamson in some manner obtained one of these castings alleged to have been made by Gilliland in August, 1911, and from it had his castings made, or that Gilliland made his original castings from one of Adamson's original devices, in which latter event it would have been impossible for Gilliland to produce his first castings prior to November, 1911, at the earliest.

The testimony of eighteen witnesses was offered to sustain the contention that Gilliland produced his exhibits 10 and 15 in the fore part of August, 1911.

Of these, **William Waldecker, Charles Haase, John Mirgain, Max Stephens, Jacob Dillman, August Schaefer and Henry Laundman**, all were employees of the South St. Louis Foundry Company, by whom the Gilliland Exhibits 10 and 15 are held to have been made, and all were employed as mechanics of one class or an-

other. Their testimony, for what it is worth, bears a remarkable similarity one to another, in that they all remember the incident in the vaguest sort of a way as having occurred in the summer time and during the hot weather. The transcript of testimony of these witnesses (Transcript, pages 47-56) discloses that the questions asked were of the most leading character, and practically dictated the answers that the witnesses gave. Furthermore, the witness Dillman was unable to fix even the year (Transcript, page 53), and the same is true as to the witness Shaefer (Transcript, page 54). It is to the testimony of these witnesses that the trial court unquestionably referred in the following comment made in the memorandum opinion rendered from the bench at the conclusion of the trial below (Transcript, page 100):

"There are some matters in this new testimony that do not favorably impress themselves. I know that a great many witnesses were examined and it is a singular thing that many of these molders and employees who were there at the time told virtually the same story one as the other, and each recollects the time about the same way each one of the others recollects it."

In addition to this testimony, we have that of **Frederick N. Kilpatrick**, secretary of the South St. Louis foundry, by whom the castings for Gilliland were alleged to have been made in August, 1911. This witness fixes the time by means of a dray ticket, defendant's Exhibit A (Transcript, page 42), which he produced, and there was also produced a carbon copy of said dray ticket, which is in evidence as "Defendant's Exhibit B" (Transcript, page 42). It appears from the testimony of this witness that there was no entry of

this work made in the books of the South St. Louis foundry (Transcript, page 43), and the alleged reason for this was that it was a gratuitous job. But there is another and more important inconsistency in the mute testimony offered by these dray slips. An inspection of the same discloses that they had no red ink serial number thereon, whereas, according, to the testimony of **William C. Wurley**, bookkeeper and shipping clerk for the South St. Louis foundry (Transcript, page 63), the dray slips commonly in use at the South St. Louis foundry were numbered serially in red ink. In fact, a comparison of the dray slip, defendant's Exhibit A, and other dray slips, complainant's Exhibit 15 (Transcript, pages 64 and 65), discloses that they were printed on different paper and differ materially in detail. In other words, it is apparent that the dray slip, defendant's Exhibit A, was made out on a special form of blank, such as was not used ordinarily in the business of the South St. Louis foundry. No reasonable explanation is given as to this, and in view of the fact that the witness Kilpatrick fixes his date entirely from this dray slip, and of the fact that said dray slip is discredited by reason of its variation from the dray slips which were usually employed at that time at that foundry, it is not felt that the testimony of this witness can be given that credit which it would require to be a complete corroboration of evidence of Gilliland.

This brings us to the consideration of the testimony of **William C. Wurley**, the shipping clerk and time keeper of the South St. Louis foundry (Transcript, page 56). This witness is another who remembers the incident by the state of the weather, and further identifies the dray slips, defendant's Exhibits A and B. (Transcript, page 57), but in connection with these dray slips there appears in the testimony of this witness an im-

portant discrepancy. The witness is clear that when the slips were made out by Mr. Kilpatrick, he (Wurley) took the original and stuck it on a file on his desk (Transcript, page 62). Further the witness stated that Mr. Gilliland took the carbon copy when Mr. Kilpatrick tore off the two sheets. But it appears from the dray slips themselves that both original and duplicate were punched identically in the same manner, as admitted by this witness (Transcript, page 62). Nor could the witness give any explanation as to how this similar perforating of the two exhibits occurred (Transcript, page 63). This point may seem in itself of little moment, but when it is realized that it is our contention that this work was not done in August, 1911, any variation in the story of any material witness becomes of considerable importance. And in this connection, attention is called to the testimony of this witness Wurley in answer to certain cross-questions as to the presence or absence of base plates for these castings (Transcript, pages 59 to 61). Here the witness volunteered that there were plates for the bottoms of the castings, but afterwards admitted that he did not see such plates, but got his idea from the testimony of one Shanks.

It is thought that the testimony of this witness, like that of the witness Kilpatrick, cannot stand the test of proving beyond a reasonable doubt the contention of appellant.

The testimony of **John F. Shanks**, general foreman of the South St. Louis foundry, was offered, and inasmuch as he testifies that he did the actual casting work on these Gilliland castings (Transcript, page 46) his testimony should have been of considerable importance in corroborating the appellant. But in the same, we find a most remarkable discrepancy, and one which we feel destroys utterly the value of the testimony of this wit-

ness. The witness at the close of his testimony (Transcript, page 47) states that he made **an underplate** for each of the castings made for Mr. Gilliland at this time. Now, this is directly contrary to the testimony given by Gilliland, not only in this suit but in another suit under this patent, to which reference will be made hereinafter, and as admitted by Gilliland in his subsequent cross-examination (Transcript, page 85). In fact, the testimony of this witness, Shanks, is strongly corroborative of our contention, which is that these castings, which we admit were made **at some time** by the South St. Louis foundry, were made not earlier than November or December, 1911, and only after Gilliland had obtained possession of one of the first Adamson vulcanizers placed on the market, and which embodied a base plate, such as the witness, Shanks, declared was cast, and such as the appellant, Gilliland, asserts was not cast at that time.

Clarence L. Shephard testified that he turned off the bottoms of some castings for Gilliland, and that it was some time between August and October (Transcript, page 70), but his cross-examination is rather enlightening as showing certain vagueness of this witness as to this and other similar incidents.

Max Huhle, another witness for appellant, testified that he purchased one of these vulcanizers from Gilliland in September, 1911 (Transcript, page 71), but his cross-examination displays such an utter want of recollection as to other and more important incidents in his life, that it was impossible to credit his recollection on this point.

Herman Miller, another witness for appellant, testified that he loaned Gilliland a pipe vise and a pipe cutter, Aug. 8, 1911 (Transcript, page 68), and on or about the same time carried two sacks of castings for Gilliland

from the Kilpatrick foundry to Gilliland's house. He produces a dray ticket covering the loan of these articles, defendant's Exhibit H (Transcript, page 69), and seems to fix the date that he carried the castings for Gilliland by that dray slip. He states (Transcript, page 68), that he got a glimpse of the castings and judged that defendant's Exhibit 10 is one of them, or one similar. There is no direct connection between the loan of the pipe vise and the pipe cutter and the transportation of the castings, and it readily can be seen that in the lapse of time a disinterested witness easily may have confused his dates on this point. Furthermore, it is rather unusual that the dray slip, defendant's Exhibit H, should have been preserved so carefully until this time.

Appellant endeavors to fix his date by the testimony of other witnesses as to events which have no direct bearing upon the production of these castings.

William J. Baier, a witness for appellant, testifies as to the loan of a three-inch bit to Gilliland, which was delivered to Gilliland by his brother-in-law, Henry Spoeneman. However, it is to be noticed that Spoeneman was working for Baier at the time the bit was loaned, and that he quit the employment of Baier on July 3, and never worked there afterwards. Furthermore, he states that the bit was returned in about a week, or not over two weeks afterwards (Transcript, page 97).

Harry Spoeneman, the brother-in-law of Gilliland, testifies as to carrying the bit to Gilliland, and also testifies that he quit work for the Boehl Hardware Co., for whom the witness Baier worked, on July 3d (Transcript, page 98).

Now, according to the testimony of Gilliland, it was subsequent to July 25, 1911, that he had his conversation with Huber and then proceeded to make the pat-

tern for the vulcanizer. Such being the case, how is it possible for a bit borrowed July 3d and returned inside of two weeks to have figured in the making of this pattern? Manifestly, this bit could have had nothing to do with any work done by Gilliland subsequent to July 15th at the outside.

Spoeneman also testifies that he saw castings on the order of defendant's Exhibit 10 on Gilliland's tool bench in the basement of his house in August, 1911, but in view of his relationship to Gilliland, it is thought that this very vague statement can by no means be accepted as conclusive.

Respecting the testimony of **Ruth Gilliland**, the daughter of appellant (Transcript, page 98), it is felt that the same requires little comment. This witness was but nine years and one month old when she gave her deposition in January, 1914, and, therefore, was but about **seven and one-half years old** when the instances concerning which she testifies are alleged to have occurred. We feel that as corroborative evidence, this testimony can be given absolutely no weight.

Testimony was also offered by **John Schroer** (Transcript, page 74) and **William T. Mellow** (Transcript, page 96), as to the making of certain castings for Gilliland at the Liberty foundry, St. Louis, but inasmuch as this incident did not take place until January and February, 1912, and as the testimony shows, as will be pointed out hereinafter, that the appellee, Adamson, was on the market with his vulcanizers in November, 1911, it is not seen that this incident can have any bearing.

EVIDENCE ON BEHALF OF ADAMSON.

The story told by the appellee, **Cecil F. Adamson**, on the witness stand appears to be a plain and credible story of the acts of a true inventor, from the conception

and first crude sketches down to the production of the completed device, as follows:

The witness states that in the summer of 1911 he had a conception of the broad idea of this invention, and, believing that it would be necessary to use a quick-curing rubber gum, first experimented with rubber to produce the desired article, and, having succeeded, proceeded to develop the mechanical structure of the vulcanizer to completion. At that time, Adamson was general superintendent of the McGraw Tire & Rubber Co., at East Palestine, Ohio, and at the same time maintained an engineering office at Akron, Ohio, which was in charge of his assistant, **William E. McCormish**, who was in constant consultation with him, both by phone and by making trips to East Palestine, all during the summer of 1911. On August 19, 1911, Adamson explained to McCormish the principle of his invention, and illustrated the same by means of a series of sketches or drawings, in evidence as complainant's Exhibit No. 5 (Transcript, page 31). His explanation, as stated in his deposition (Transcript, page 32), related first to the figure marked "1" in the upper left-hand corner of said exhibit, by which he explained the principle of operation of the device; and this was followed by the making of Figures 2, 3, 4 and 5 of said exhibit, which he states were, in his view, practical embodiments of the idea. This sketch was signed and dated August 19, 1911, by Adamson, and was witnessed by McCormish, **Phyllis Gregory**, Adamson's sister-in-law, and **Charles Gregory**, his father-in-law, the explanation to McCormish having taken place at Adamson's residence, where the said witnesses, Phyllis and Charles Gregory also resided. McCormish was instructed to take this sketch to Akron and to have produced the construction shown in Figures 2 and 3, which illustrated what is known as the con-

centric-ring construction. McCormish returned to Akron, but on account of the press of other matters did nothing towards having the article made until Labor Day, 1911, when Adamson came to Akron on a visit. Upon learning that McCormish had done nothing, Adamson took the sketch back to East Palestine and immediately had a cup turned out in accordance with Figures 2 and 3, upon a lathe in the plant of the McGraw Tire & Rubber Co. He at once tested it out, but found there was great difficulty in igniting the gasoline, because of the space taken up by the rings, preventing access of oxygen to support combustion, and thereupon decided to cut out the rings and replace them with pins, which was done immediately. This was tested out and was found to produce the desired results in a most satisfactory manner. Adamson made further experiments with this device, as by changing the height of the rim of the cup, and having become satisfied with the construction, he made more complete drawings, in evidence as complainant's Exhibit No. 8 (Transcript, pages 34 and 35), which he gave to McCormish on the occasion of another visit of the latter to East Palestine, with instructions to have made a pattern and several castings in Akron. This McCormish did, some time in the early part of October, 1911, the pattern being made by the firm of Dietrich & Brunswick, pattern makers, Akron, Ohio, and the castings being made by the Taplin-Rice-Clerkin Co., Akron, Ohio. These devices McCormish sent to Adamson, and as they were found to be satisfactory, Adamson immediately made arrangements with the Ohio Foundry Co., of Cleveland, Ohio, to make castings in order that the article might be placed upon the market. The castings were completed and delivered to Adamson at East Palestine, and in November, 1911, were first placed on the market.

It will be observed by reference to complainant's Exhibit No. 8 that the slots in the lugs are turned in opposite directions, just as are the slots in the Gilliland Exhibits Nos. 10 and 15. There is also in evidence as complainant's Exhibit No. 9, the original pattern made by Dietrich & Brunswick in October, 1911, though said pattern does not contain the pins which were placed in it originally, said pins having been removed for the purpose of making a core box (Transcript, page 35). Said pattern also shows very clearly that the slots therein originally faced in opposite directions, as shown by the testimony of **Anthony J. Dietrich** and **Kenneth L. Douglas** (Transcript, pages 101 and 102 hereinafter to be referred to). There is also in evidence the original vulcanizer made by Adamson at East Palestine in September, 1911, the same being complainant's Exhibit No. 6, and the clamp used by Adamson in operating this vulcanizer, the same being complainant's Exhibit No. 7.

The testimony of Adamson in these particulars is most fully corroborated by the deposition of the following witnesses:

Anthony J. Dietrich testifies that he is a member of the firm of Dietrich & Brunswick, now The J. Dietrich Pattern Works, and that he made the patterns for Adamson in October, 1911, the same being billed Oct. 16, 1911, and that the slots faced in opposite directions (Transcript, pages 101 and 102).

Kenneth L. Douglas testifies that he was an employee of Dietrich & Brunswick in 1911, and did the actual work on the patterns, and testifies further that the slots in the lugs on this original pattern faced in opposite directions (Transcript, page 103).

P. J. Boylan testifies that he is secretary of the Taplin-Rice-Clerkin Co., Akron, Ohio, and that he made two small castings for Mr. McCormish, they being entered

under date October 12, 1911, and entered as being made for C. F. Adamson. He also testifies that they were made from a wood pattern painted black and furnished by Mr. McCormish, and that they looked the same as defendant's Exhibit 15.

William E. McCormish confirms in every particular the testimony of Mr. Adamson, as to the original sketch, complainant's Exhibit No. 5, the sketches, complainant's Exhibit No. 8, the wood pattern made by Dietrich & Brunswick, and the making of the two small castings by the Taplin-Rice-Clerkin Co. He further testifies as to the placing of the matter in the hands of the Ohio Foundry Co. and the making of the castings by that concern.

From this testimony there can be no doubt but that the story told by Adamson is corroborated in every particular, and that beginning August 19, 1911, he had a clear conception of this invention, and proceeded diligently to reduce it to practice, which was finally accomplished practically in commercial form the latter part of October, 1911, and was in November, 1911, placed on the market.

**GILLILAND HAD FULL KNOWLEDGE AS TO
THE DATES OF CONCEPTION AND RE-
DUCTION TO PRACTICE THAT
ADAMSON COULD PROVE.**

That this statement must be accepted as true is shown by the following facts:

In the transcript, page 37, is found a stipulation to the effect that the application of Adamson, which was filed October 25, 1911, was put in interference with a number of other applications, among which was one of William R. Major, of East Palestine, Ohio, and that on March 5, 1913, a final decision in favor of Adamson

and against Major was duly rendered by the Patent Office. In this interference testimony was taken on behalf of Adamson, and a full disclosure of all his dates as to conception and reduction to practice was made in said testimony. Said interference having terminated March 5, 1913, and the Adamson patent in suit having issued April 1, 1913, under the rules of the United States Patent Office the entire record of the interference was thrown open to the inspection of the public, so that it became a matter of public knowledge what dates could be shown by Adamson. We feel that this point is important because Gilliland has antedated Adamson only by about eleven days, as Adamson has proved a complete conception, the making of the drawings and a disclosure to others as early as August 19, 1911.

THE MISSING WITNESS, FERDINAND L. HUBER.

At the opening of trial of this case below, counsel for defendant stated that they had been trying to get **Ferdinand L. Huber** as a witness, but the marshal had not succeeded in serving him, and asked that a special effort be made to bring him into court (Transcript, page 19). It was also stated on behalf of complainant that they also desired the presence of this witness, and it was shown, further, that **Mr. A. M. Holcombe**, of counsel for appellant, spoke with this witness at his place of business in St. Louis on Friday or Saturday noon before the trial, which began the following Tuesday. (Transcript, page 99).

Now, this patent was adjudicated in the United States District Court for the Eastern District of Wisconsin before the Hon. Ferdinand A. Geiger, the month previous to this trial in the court below, and, as shown by this

record, testimony taken out of court of this witness, Ferdinand L. Huber, was presented and considered by Judge Geiger (Stipulation, Transcript, page 28), and, as shown by a certified copy of the opinion of Judge Geiger, offered in evidence (Transcript, page 26), this same defense was before Judge Geiger and was passed upon by him adversely, though commented on at some considerable length by him.

Surely, counsel for appellant must have realized the importance of this corroborative evidence of Huber, and being in touch with him as late as the Saturday before the trial, and with a subpoena issued, it seems strange indeed that he should have been permitted to leave the jurisdiction, as apparently he did. In fact, it was our earnest wish that this witness should be produced, as we were satisfied that he would not dare to tell the same story in open court as he told as a witness out of court. And we believe that the fact that he left the jurisdiction of the court below in order to escape the subpoena is conclusive that he did not dare to appear and repeat his earlier story. Flight is a confession of guilt, and we are satisfied that had this witness been produced the story that he would have been forced to tell would have borne little resemblance to anything corroborating the statements of Gilliland as to the incidents alleged to have taken place in July, 1911, between him and this witness.

There was also offered on behalf of the appellee, the testimony of **Melvin L. Huber**, a brother of Ferdinand L. Huber, who stated that his brother had not been at his place of business since Monday morning, and that he did not know where he was (Transcript, page 99). He also testifies that Mr. Vernia, a witness on behalf of appellee, had been looking for him on Monday, the day before the trial.

PRIOR ADJUDICATION OF PATENT IN SUIT.

As stated hereinbefore, this patent was adjudicated in December, 1911, in the United States District Court for the Eastern District of Wisconsin, in a suit entitled Cecil F. Adamson v. The C. A. Shaler Co., and notwithstanding that one of the defenses was this alleged prior invention on the part of Gilliland, the court, in its opinion, delivered from the bench at the conclusion of the trial, took occasion to state as follows:

"In the giving of Mr. Gilliland's testimony, I was impressed, and that impression, and the conviction, has not been shaken by anything which has been said here in argument, respecting the improbability of its truth." (Transcript, page 27).

Now, as shown by this record (Transcript, page 87), the appellant, Gilliland, not only gave his testimony in that suit by deposition, but also appeared in open court before Judge Geiger, and was cross-examined by counsel for complainant, and then interrogated at length by Judge Geiger himself, this deposition being produced **in extenso** in this record (Transcript, pages 87-96). Furthermore, the testimony of the missing witness, Ferdinand L. Huber, was before Judge Geiger, as well as the testimony of Max Huhle, Herman Miller, William C. Wurley, William T. Mellow, and Clarence L. Shephard, all of whom testified in open court in the court below, as well as five other witnesses not produced in the court below. Notwithstanding this array of witnesses, among whom was the much-sought-after Huber, Judge Geiger had no hesitancy in deciding that the story told by Gilliland was **inherently improbable**; that he had failed to corroborate in the manner that such statements usually are corroborated, by the pro-

duction of drawings, models, and more detailed description of failures which all men must have in the development of an idea, and for that reason could not and should not be accepted to the exclusion of a reasonable doubt as against the story given by Adamson.

THE BURDEN UPON THE APPELLANT.

It is elemental in the adjudication of letters patent that to overcome a granted patent by evidence offered to show prior public use, or a prior production of the invention in question, that the proof shall be such as to convince the court **beyond a reasonable doubt**; shall be such as would convict a defendant in a criminal case.

T. B. Woods Co. v. Valley Iron Works, 191 F., 196; 196 F., 780.

De Laval Separator Co. v. Town Dairy Co., 194 F., 423.

Underwood Typewriter Co. v. Elliott-Fisher Co., 165 F., 927.

EFFECT OF A DECISION AS TO A QUESTION OF FACT AFTER A TRIAL IN OPEN COURT.

It has long been the practice in the federal courts to hold the finding of a Master as to a question of fact to be conclusive. So also the findings of fact by the court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made.

The rule was laid down very clearly by the Supreme Court in Davis v. Schwartz, 155 U. S., 636. There Mr. Justice Brown, in stating the opinion of the court, held as follows:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we

think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Rev. Stat., Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, **or upon the credibility of witnesses**, or so far as there is any testimony consistent with the finding, it must be treated as unassailable." (Black type ours.)

So also in *Kimberly v. Arms*, 129 U. S., 512, the court held as follows:

"Its (the court) findings, like those of independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given the evidence, or in the application of law, but not otherwise."

And this rule has been followed by the Circuit Courts of Appeals as shown by the ruling of the court in *Cook v. Robinson*, 194 F., 759, where the court stated as follows:

"The case having been tried without the intervention of a jury, the court's findings are conclusive of the questions of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made."

Prior to the adoption by the Supreme Court of the present New Equity Rules, testimony in equity cases was taken out of court, reduced to writing, and pre-

sented for the court's consideration, to find the facts as well as the law. Upon appeal, the complete record was sent up, and the Court of Appeals had the same opportunity, and identically the same evidence, as did the lower court upon which to predicate its judgment. But under the New Equity Rules whereby causes are tried in open court, and the witnesses are before the court for him to judge in person as to their credibility, equity cases take on a different aspect, in that while the trial judge has every opportunity to pass upon the credibility of the witnesses, the Court of Appeals is even less able than heretofore properly to weigh the same, in that under the new rules the transcript is not even a complete reproduction of the evidence, but is a brief of the same.

It would seem to follow, therefore, that the rule as laid down in the opinions hereinbefore quoted now should apply with equal force to questions of fact in equity cases as passed upon by the trial judge. He alone confronts the witnesses, and he is far better able to pass upon their credibility than would be a court of appeals, wherein a mere brief of the evidence given is submitted for consideration. We feel, therefore, that by analogy to the practice in the consideration of a Master's findings and by analogy to the practice in the consideration of findings of a lower court without reference to a jury as to questions of fact, the findings of fact of the court below, where all the witnesses have appeared before him and have given their testimony orally, should not be questioned.

CREDIBILITY OF TESTIMONY ON BEHALF OF PETITIONER.

Counsel for Gilliland, in the latter part of their brief, have commented upon the fact that the petitioner, Mr. Adamson, paid the sum of \$20,000 in order to get

rid of the interference proceedings filed by Major and backed by the McGraw Tire & Rubber Co. We believe that a consideration of the testimony of the petitioner, Mr. Adamson (Transcript, page 38), will explain very fully his position and the grounds for his action in this matter. As stated by him, his former employers, the McGraw Tire & Rubber Co., had provoked an interference and had gone on the market with the device. Testimony had been taken, and he (Adamson) was satisfied that he had proved priority, but was confronted by the fact that under the Patent Office procedure the issue of the patent to him could be delayed by appeals for several years. In the meantime the market was being glutted with infringements or copies of his device, as evidenced by the stipulation (Transcript, page 37), wherein there was offered in evidence about thirty-five separate clippings taken from various magazines published during the years 1912 and 1913, and disclosing forms of as many separate and distinct portable gasoline vulcanizers for tire tubes, all embodying, both structurally and functionally, the principle of operation disclosed in the patent in suit, said vulcanizers being offered for sale by various individuals, firms and corporations, widely scattered throughout the United States. The device of the patent in suit was of such character that if a return was to be had for his efforts, it was essential that he obtain his patent immediately in order to clear the field of these infringers, and naturally he decided that he had no alternative but to buy out the opposition of the McGraw Tire & Rubber Co., which he proceeded to do, at an excessive cost.

The criticism by counsel for appellant in their brief as to the testimony of appellee's witness, Vernia, is absurd. This witness, who was in the employ of Mr. Adamson, in his zeal to serve his employer, and know-

ing very well that if known as an employee of Adamson's he could obtain no information as to infringement, represented himself as from another firm. Furthermore, the testimony of this witness is purely collateral, and has no bearing upon the main points in the case, nor should his line of action, even if open to criticism, reflect upon the credibility of his employer, Adamson.

ERROR OF FACT.

It is with extreme regret that we call the attention of this Honorable Court to the fact that from the opinion rendered it is apparent that the United States Circuit Court of Appeals for the Eighth Circuit in preparing said opinion gave such scant attention to the actual facts developed in the case as to fall into an unmistakable error of fact in its decision. Thus, the opinion holds as follows:

"Those facts demonstrate beyond all reasonable doubt that the appellant used **and sold** a vulcanizer embodying all the features contained in appellant's patent, not only before the patent issued, but **even before the idea became definitely formed in appellee's mind.**" (Black type ours).

This is a plain error of fact in that there cannot be found any where in the testimony on behalf of defendant a single statement alleging a sale of one of these vulcanizers prior to August 19, 1911, the date upon which your petitioner first made a complete disclosure of the invention to others. In fact the testimony of defendant himself is clear that his first claim as to a sale is the one alleged to have been made to the witness, Max Huhle, in September, 1911, (Transcript, p. 71).

**ERROR OF LAW IN DECIDING THAT THE
LOWER COURT HELD THAT IT WAS
BOUND BY THE DECREE OF AN-
OTHER COURT IN ANOTHER
CASE.**

The opinion of the Circuit Court of Appeals contains the following statement:

"The lower court held that it was bound by the decree of the United States District Court for the Eastern District of Wisconsin, rendered in another case."

This other case was one brought under the patent in suit by your petitioner against the C. A. Shaler Co., of Waupon, Wisconsin, and as a part of the defense this defendant, Gilliland, appeared in open court and gave testimony as to the defense set up in the present case, his testimony being accompanied by the testimony of quite a number of witnesses in the present case.

With respect to the ruling of the Circuit Court of Appeals that the lower court held that it was bound by this decree in the Eastern District of Wisconsin, the attention of this Honorable Court is called to the fact that the lower court in the present case expressed himself in the most positive terms as to the testimony offered before him. Thus, Judge Dyer, in commenting upon the decision of Judge Geiger, of Milwaukee, in the other case, stated as follows:

"My own judgment is that had all of this new testimony been before Judge Geiger when he decided the case, it is not of such character as would change Judge Geiger's opinion."

There seems to be nothing more to be said on this point, for it is plain that the lower court in using such language has expressed his opinion in unmistakable terms as to the testimony offered before him.

CONCLUSION.

The two salient points to be borne in mind are:

1. That the vulcanizers alleged by Gilliland to have been made August 8, 1911, as evidenced by defendant's Exhibits 10 and 15, are identical in every particular with the first few hundred vulcanizers put on the market by the petitioner, Adamson, in November and December, 1911; from which fact it is inevitable that the conclusion be drawn either that Adamson saw one of Gilliland's vulcanizers and copied it, or that Gilliland did not make these vulcanizers until after he had obtained one of this first lot put on the market by Adamson.
2. But eleven days elapsed between the date alleged by Gilliland, August 8, 1911, and the date which Adamson has proved that he had a clear conception of this idea, had made sketches of the same, and had disclosed it to others, said date being shown by complainant's Exhibit No. 5, the sketch of August 19, 1911.

Adamson was a resident of East Palestine, Ohio, a town located on the extreme eastern border of the State, and but one-half mile from the Pennsylvania State line. Gilliland was a resident of St. Louis, Mo., the two places being practically four hundred miles apart. No evidence is offered by Gilliland that between August 8th and August 19th, he disposed of or circulated any of these vulcanizers, and it is inconceivable how Adamson could have obtained in that brief time any knowledge of what Gilliland had done, if he had actually made these vulcanizers. Neither of these parties, according to the evidence, was aware of the other's exist-

ence until the following year; and when it is borne in mind that the burden is upon the defendant, Gilliland, to prove his case beyond a reasonable doubt, it is felt that this mute circumstance alone militates so strongly against the truthfulness of his tale as to deprive it of any weight. To be plain, our contention is that Gilliland, sometime in December, 1911, or the first part of January, 1912, obtained one of the first of Adamson's vulcanizers placed on the market, one of the lot in which the openings in the lugs were turned in opposite directions, and either used it as a pattern at the South St. Louis foundry, or made a wooden pattern from it, which was used there.

The most vital witness that Gilliland presented, John F. Shanks, the man who states that he did the actual work in casting these Exhibits 10 and 15, differs radically from Gilliland in stating that he also cast base plates with the cups. We have no doubt but that he did, and we have no doubt but that Gilliland also copied the base plate of Adamson and furnished it to Shanks.

Counsel for appellant asks you to believe that the testimony of these numerous witnesses is conclusive as to the fact that Gilliland produced this vulcanizer in August, 1911. In reply thereto it seems sufficient to call the attention of the court to the language of Mr. Justice Brown in

Washburn & Moen Manf. Co. v. Beat 'Em All
Barbed Wire Co., 143 U. S., 275.

"We have now to deal with certain unpatented devices claimed to be complete anticipations of this patent, the existence and use of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, **their proneness to recollect things as the**

party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer. The doctrine was laid down by this court in Coffin v. Ogden, 18 Wall., 120, 124, that 'the burden of proof rests upon him,' the defendant, 'and every reasonable doubt should be resolved against him.'"

(Black type ours.)

And this view of the matter is emphasized by the view taken by the trial court in the memorandum opinion rendered (Transcript, page 100), where he commented so unfavorably upon the manner in which the employees at the South St. Louis foundry, each told the same story as the other and each recollected the time about the same way that each one of the others recollected it. It is plain from this statement of the trial court, who had the very best opportunity to pass upon the credibility of these witnesses, that he was unfavorably impressed. And with this same defense before him,

Judge Geiger at Milwaukee took occasion to comment upon the inherent improbability of the story as told to him by Gilliland in open court. He commented further upon the lack of that corroboration that is usually found in cases of this character as to the initial steps taken by a true inventor and the failures met with before success is achieved, as follows (Transcript, page 28):

"That between the date which he gives, July 25th, and August 7th, he should perfect this and ask that his statement be accepted without any corroboration whatever in the way that these statements are usually corroborated, by the production of drawings, models and more detailed description of the failures which all men must have in the development of an idea, cannot and should not be accepted to the exclusion of a reasonable doubt as against the story given by the complainant here."

Contrast this with his comment as to the testimony on behalf of the petitioner, Adamson, as follows (Transcript, page 27):

"He (Adamson) had a fund of information, some learning on the subject, which as between him and Gilliland, put him in a position where what he said respecting his achievements can be quite readily accepted and without suggestion of inherent improbability."

In view of the foregoing, it is submitted that the decision of the United States Circuit Court of Appeals for the Eighth Circuit should be reversed, and that the decision of the lower court, and, in effect, the decision of the District Court at Milwaukee, should be sustained.

Respectfully,

PERCY B. HILLS,
Solicitor for Petitioner.

DOUGLAS W. ROBERT,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 396.

CECIL F. ADAMSON, Petitioner,

vs.

DAVID C. GILLILAND, Respondent.

This case comes before this Honorable Court on a writ of certiorari, requested by the plaintiff, Cecil F. Adamson, and granted the 16th day of March, 1916, directed to the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE.

This suit in equity was originally brought by Cecil F. Adamson, complainant, against David C. Gilliland and Amanda Gilliland, doing business under the name of Gilliland Auto Supply Company, at St. Louis, Mis-

souri. It appearing at the trial, however, that Amanda Gilliland was not connected with the business, the bill was dismissed by complainant as to said defendant and the trial proceeded against David C. Gilliland.

Defendant is charged with the infringement of complainant's patent No. 1,057,911, issued April 1, 1913, for a Portable Vulcanizing Device for Tires. The patent is found in the Transcript of Record at pages 19-24, and the device described therein is quite a simple one and the principle of its operation readily understood. The invention is intended especially for use in repairing punctured inner tubes of automobile tires, and, briefly stated, consists in a cup-shaped metal member or vulcanizer which is adapted to be clamped to a clamping plate, the tube to be vulcanized being held in place between the vulcanizer and the clamping plate during the process of vulcanizing. The work is vulcanized by simply burning a certain quantity of gasolene in the cup or vulcanizer, the rubber being vulcanized by the heat produced upon the bottom of the cup by the combustion of the gasolene.

The particular form of the patented device upon which the infringement charge is based is shown in figures 1 and 2 of the patent drawing opposite page 18 of the Transcript. The device is here shown with a number of posts extending upwardly from the bottom of the cup to about the level of the outer rim, and the claim is made by complainant that these posts perform the function of automatically regulating the temperature of the bottom or vulcanizing plate so as to prevent it from becoming overheated during the vulcanizing process. It is stated in the patent that the desired temperature at which the vulcanizing member

should be retained in order to effectively vulcanize rubber is substantially the same as the boiling point of the gasolene or like combustible fluid which is placed in the receptacle. It is thereupon claimed that in complainant's device the flame caused by the combustion of the gases rising from the gasolene acts directly upon the posts and heat is conducted by the posts down through the gasolene to the vulcanizing plate. As the temperature of the gasolene and vulcanizing plate rises, the rapidity with which the gas is given off increases, causing the flame to rise above the surface of the gasolene and above the top of the posts. When this occurs, the flame is rendered ineffective for the purpose of heating the posts or receptacle, and the temperature of the vulcanizing plate and the gasolene is gradually lowered until the flame again drops within the receptacle and becomes effective. The effect claimed is that the temperature of the gasolene and of the vulcanizing plate is thus automatically controlled so as to prevent them from becoming either over or underheated during the vulcanizing operation.

The defendant admits making and selling vulcanizing devices identical with figures 1 and 2 of the patent, and admits that said device as used by him is within the scope of the various claims of the patent. He claims, however, to have himself invented or produced the device prior to its alleged invention by complainant, and this question of priority constitutes the principal question in the case.

The complainant testifies that he is thirty-two years of age and resides at East Palestine, Ohio, and engaged in business under the name of Adamson Manufacturing Company. He is a consulting engineer by

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profession, and during 1911 was superintendent of the factory of the McGraw Tire & Rubber Company at East Palestine, where he spent the major portion of his time, but also operated an office at Akron, Ohio, as a consulting engineer. Mr. McCormish, a witness for complainant, was associated with him in his engineering office. Complainant testifies that his attention was directed to the production of a cheap and simple vulcanizer during the summer of 1911 and that he first described his idea to Mr. McCormish at East Palestine and instructed him to go back to Akron and have some patterns made or turn out an experimental device. He made a sketch for Mr. McCormish, which is marked "Complainant's Exhibit 5." (Transcript, opposite p. 30.) His first sketch is signed by complainant and dated August 19, 1911, and is witnessed by Mr. McCormish and two other witnesses. It does not show the device with the pins or posts shown in the patent, but it shows in figures 2 and 3 two concentric rings inside of the cup, and it was in this form that the first experimental device is claimed to have been made. Mr. McCormish said he would have the device made but did not send it, and finally, on Labor Day, 1911, Mr. Adamson says he went to Akron and took the drawing back and had it made at the machine shop at East Palestine the next day. This original device was put in evidence as "Complainant's Exhibit 6."

The device was first made with the two concentric rings in the cup, but as the result of the combustion was not satisfactory, complainant said that in order to let in more air he had the rings turned out and the pins put in. This occurred, he testified, within the next few days after Labor Day, 1911. On October 6th, he made a sketch of the vulcanizer showing the pins

(Complainant's Exhibit No. 8, Transcript, opposite p. 34), and a sketch of the clamping plate to be used in connection with it, and from these sketches the working drawings were made, and patterns were made about the twelfth or fifteenth of October, 1911 (Transcript, p. 35). He first began to sell the vulcanizer about the latter part of October and all through November and from then on. Complainant estimated that two or three thousand had been sold by December 1st. A salesman was put on the road on December 1st, who started and went east toward Buffalo and Rochester and on through to New York. Since that time, complainant had sold in the neighborhood of 450,000.

In addition to complainant's oral testimony, his counsel (page 24 of the Transcript) stated to the court "that this patent has recently been adjudicated in the United States District Court for the Eastern District of Wisconsin, Judge Geiger rendering an opinion from the bench after full trial and proofs." He thereupon offered in evidence a certified copy of Judge Geiger's decree, entered December 17, 1913, which was objected to by defendant's counsel as incompetent, irrelevant and immaterial to any of the issues in this case, and because the defendant here was not a party to that suit and is not bound by it. The Court allowed the evidence to be put in and the defendant duly excepted. The decree in question, entered in the case of Cecil F. Adamson, complainant, versus Clarence A. Shaler *et al.*, appears at pages 24-25 of the Transcript. Mr. Hills stated that he expected to prove that Mr. Gilliland participated in the defense in the Shaler case and gave testimony therein, on which ground he claimed the decree was particularly material. He then offered in evidence a certified copy of the opinion rendered by

Judge Geiger (Transcript, pp. 26-28), and defendant's counsel offered the same objection and saved the same exception to the opinion as to the decree. The importance of this exception appears from the fact that when he came to render his own judgment in the case, his Honor, Judge Dyer, announced that he considered himself bound by the decision of Judge Geiger in the Shaler suit and it was upon the principle of following Judge Geiger's decision that the decree against Gilliland was entered (Transcript, p. 100), although his Honor intimated that he did not believe that the additional evidence in this case would have changed Judge Geiger's opinion had it been produced before him.

One other fact in the complainant's case deserves notice. Complainant, in his direct examination, testified that while his application was pending in the Patent Office he was brought into interference with a number of other claimants and that the interference proceedings finally narrowed down to an issue between Adamson and William R. Major, also of East Palestine, Ohio. Judgment was rendered on September 24, 1912, on this interference, in favor of Adamson, and upon this decision the patent to Adamson was issued. On cross-examination, Mr. Adamson admitted that it was the McGraw Rubber Company, the concern at East Palestine for which he was superintendent, which was the party in interest in the Major application, and that it was only by the payment of the sum of \$20,000.00 by Adamson that these parties were induced to withdraw and allow the patent to be issued to him. (Transcript, pp. 36-38.)

Only an outline of the defendant's testimony will be given in this place, a fuller discussion of the defendant's evidence being reserved for the argument.

Mr. Gilliland testified that he first produced vulcanizers corresponding to Figures 1 and 2 of the patent to Adamson in the first week of August, 1911. This was, of course, prior to the time of Adamson, who, as above seen claims to have first produced this form of vulcanizer the latter part of October (Transcript, p. 35). Mr. Gilliland, during 1911, was in partnership with another man on Olive street, St. Louis, under the name of "Auto Clearing House." In this business, he was handling, among other things, vulcanizing patches for automobile tubes, and it was in connection with the selling of these vulcanizing patches that the idea of the present vulcanizer was developed. He had occasion to sell some of the patches to a man named Huber, and in order to show him how they could be easily vulcanized, he went to a hardware store on Vandeventer avenue and bought a small ladle and a screw clamp, took them to the store on Olive street, and with this outfit demonstrated to Huber the process of vulcanizing patches. This was done by simply putting the patch on the tube and then putting the ladle on top of them, clamping them to the bottom of the ladle with a screw clamp. Gasolene was then poured in and ignited, and in about ten or fifteen minutes, when the gasolene was burned out, the patch was vulcanized. (Transcript, p. 75.) Huber asked why they could not sell the vulcanizers to the people that were using the patches. To this, Gilliland said, "Why, anyone can go to a hardware store and buy a ladle and clamp," and Huber then suggested putting it in "salable condition" by taking the ladle and putting some ears on the side and some pins in the center. (Transcript, p. 76.) This led to Gilliland making a wooden pattern, which he took to Mr. Kilpatrick's foundry in

South St. Louis, known as the South St. Louis Foundry, and the first castings or vulcanizers were made for Gilliland at this foundry on the sixth or seventh of August, 1911. Defendant testified definitely that it was on the seventh of August that he got his first castings. (Transcript, p. 76.)

This testimony as to the making of these castings for Gilliland during the first week of August was corroborated by a number of witnesses connected with the foundry at that time. These witnesses were Mr. Kilpatrick, secretary and manager of the foundry; Mr. Wurley, the time keeper; Mr. Shanks, general foreman and the man who himself made the original castings; besides whom were William Waldecker, Charles Haase, John Mirgain, Max Stevens, Jacob Dillman, August Schaefer and Henry Laundman, all employees of the foundry at the time. Several other witnesses who were not connected with the foundry were also introduced to corroborate Mr. Gilliland's testimony, but as the judgment in this case turned principally upon the testimony of the witnesses for defendant, a close analysis of this testimony is reserved for the argument.

RULINGS BELOW.

All of the testimony on behalf of the defendant in this case was presented orally in open court before the United States District Judge for the Eastern District of Missouri, who upon January 25, 1914, rendered an oral opinion from the bench, holding that the complainant was entitled to recover, and directing that a decree be entered in accordance with the prayer of the bill (Transcript, p. 100).

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From this decision of the trial court, an appeal was duly taken by the defendant to the United States Circuit Court of Appeals for the Eighth Circuit, and on October 11, 1915, an opinion was handed down by said Court reversing the ruling of the trial judge, and directing that the bill be dismissed. From this ruling, the matter comes before this Honorable Court on writ of certiorari.

ARGUMENT.

The crucial question in this case is a question of fact. The whole issue turns upon the question whether Gilliland produced the vulcanizer in question prior to Adamson. Taking the testimony of Adamson at its face value, he does not claim to have actually produced the vulcanizer until the latter part of October, 1911, nor to have placed it on the market until about the first of November, 1911, at which time he began making sales in Ohio, and somewhat later through the East. The testimony of Gilliland and his witnesses shows that he was in possession of the idea prior to August, 1911, and that he had some vulcanizers made at the South St. Louis Foundry during the first week of August. Gilliland produced full proof of the facts set up by him before the trial court, but before either he or his witnesses had been given an opportunity to be heard, he was faced with the decree rendered in favor of Adamson by Judge Geiger in the case against Shaler in Wisconsin. This decree and the accompanying opinion were not introduced merely for the purpose of showing an adjudication of the complainant's patent in another court against other parties, but complainant's counsel stated that it was his contention that the decree and opinion were particularly material in the present case because he claimed that Gilliland had participated actively in the defense of the Shaler suit and had given testimony therein. (Transcript, p. 26.) The Court went even further than this, and in his opinion (Transcript, p. 100) expressly based his decision upon what he conceived to be his "duty as a judge to follow the decision of the Court in the first

instance." It is true that additional testimony was introduced in this case, which was not before Judge Geiger, but even this additional testimony is mentioned in the opinion not as matter calling for the direct judgment of the Court in this case, but merely as matter of speculation as to whether it would have changed the opinion of Judge Geiger had it been placed before him in the Shaler suit. The entire opinion of the District Court is plainly based upon the judgment of Judge Geiger and not the independent judgment of the District Court itself. At the outset, the opinion says:

"In this case that was before a Judge of the United States Court of Milwaukee it is claimed here that Mr. Gilliland was a witness; that his deposition was taken and that he was examined orally in court.

"All of his claim as to when this work was done by him was before Judge Geiger. Judge Geiger has decided the case not only upon the testimony given before him, but with the depositions of Mr. Gilliland and Mr. Huber before him."

After a little further discussion, the opinion concludes:

"My opinion, therefore, is that following the rule that has been long adopted and followed in the various courts in this country, where a claimant of a particular device is examined before this Court, it becomes my duty as a Judge to follow the decision of the Court in the first instance. Believing that it is my duty to follow the decision of Judge Geiger, and knowing, as the record shows, that both Mr. Gilliland and Mr. Huber were examined as witnesses before that Court, either orally or by deposition, I cannot say that this testimony now introduced here would have changed

Judge Geiger's opinion at all." (Transcript, p. 100.)

It is respectfully submitted that the above opinion shoots wide of the mark. The question to be determined in this cause between Cecil F. Adamson, complainant, and David C. Gilliland, defendant, is not what was Judge Geiger's decision in the case between Adamson and Shaler, and still less is it in issue as to what Judge Geiger would have decided had he had the benefit of the testimony of the numerous witnesses who testified for Gilliland who had no part in the Shaler case. Gilliland is entitled to his day in court, and this he did not have in the Wisconsin proceeding. In the Shaler case he was neither a nominal party nor a party in interest, nor was he represented by counsel, nor did he contribute in any way to the defense of the case other than that he was called as a witness for Shaler and gave his testimony, which, in the opinion of Judge Geiger, was insufficiently corroborated. The learned Judge noticed the want of corroborative evidence to support Mr. Gilliland's testimony in that case, in the following words:

"That between the date which he gives, July 25th, and August 2nd, he should perfect this and ask that his statement be accepted without any corroboration whatever in the way that these statements are usually corroborated, by the production of drawings, models and more detailed description of the failures which all men must have in the development of an idea, cannot and should not be accepted to the exclusion of a reasonable doubt as against the story given by the complainant here. That I am unwilling to do, and I find against the defendant upon that ground." (Transcript, p. 28.)

Such being the ruling of Judge Geiger, which we are not disposed to criticize, when Mr. Gilliland now comes into court in his own case with an abundance of the corroboration which was wanting in the Shaler case, he is met with the ruling that his defense has already been passed upon by the judge who passed upon the Shaler evidence. The injustice of thus foreclosing Gilliland by the application of some rule which is supposed to have "been long adopted and followed in the various courts in this country" and which is assumed to require a court in such cases "to follow the decision of the judge in the first instance," would seem to be so palpable as to require no further argument. We confidently believe that this Court will hold that the defendant is entitled to a careful and painstaking consideration of the evidence which he produces in his own case and that the Court in passing upon the issues here presented is in no way concluded by the opinion of Judge Geiger.

The Evidence Conclusively Shows That Gilliland Developed the Vulcanizer in Issue Prior to the Date of Its Alleged Invention by Adamson.

Let us examine now the evidence for Gilliland. **Mr. Gilliland** for himself testified that he had formerly been engaged in the bicycle business in Indianapolis and that the principle used in the vulcanizer in suit was well known at that time and was used by him and others in Indianapolis in vulcanizing bicycle tires. (Transcript, p. 75.) The ladle, Defendant's Exhibit 2, is the original ladle that was used by him fifteen years ago at Indianapolis and was left in his father's tool box when he and his brother closed up their bicycle business there in 1897. (Transcript, p. 80.) This ladle was used by cleaning off the tube or casing that

needed to be repaired, putting it on the work bench or a block of wood, putting on the tire some raw cement, or vulcanizing cement, and raw rubber, then clamping the ladle down on the tube or casing with an ordinary clamp, and pouring in the gasolene and igniting it. Defendant's Exhibit 8 represents the kind of clamp used and is known as a "C-clamp" or an ordinary cabinet maker's clamp. The clamp is tightened or loosened on the work by turning the screw. In the vulcanizing operation, the screw extends all the way to the bottom of the ladle. (Transcript, p. 81.) We have here the main principle utilized in the vulcanizer in suit, and in this connection, it is to be noted that even Judge Geiger stated that he did not "think there is any doubt but that prior to the appearance of Mr. Adamson on the field of exploration the idea was known that a vulcanizing process could be carried on through the use of a gasolene liquid inclosed in structures similar to those which have been exhibited here, the Inman structure and the Gilliland ladle * * *." (Transcript, p. 26.) The invention, therefore, if there is one here, is necessarily confined to such points of structural details as may be said to differentiate the so-called Adamson device from such pre-existing devices as the Gilliland ladle and clamp and others similar to it. These differences consist in only two points: The providing of the cup or receptacle with oppositely disposed ears for more convenient clamping; and the placing of the pins or posts inside of the cup with the result, as is claimed, of securing a more uniform regulation of the temperature of the bottom during the vulcanizing process. It seems to have been Judge Geiger's idea that Mr. Adamson, being a professional man, was better equipped to work out an invention of such a character than Mr. Gil-

liland, who was not a professional man. (Transcript, p. 27.) It is submitted, however, that when the real scope of the invention is considered, it is one which is not beyond the inventive capacity of an intelligent man who had for years been familiar with the practical work of vulcanizing tires of bicycles and automobiles. Certainly, there is nothing about the idea of providing the vulcanizer with ears in order that it might be clamped down, which requires anything more than ordinary, practical, mechanical intelligence. This leaves only the pins, and Mr. Gilliland gives an explanation of how he came to put them in the cup, which is at once natural and entirely consistent with the ability of a non-professional man. His explanation is that there was no secret about the use of the old ladle, but that anyone could go to a hardware store and buy a ladle of such a character and vulcanize with it. In order that there might be a better profit in the sale of the article, it would necessarily have to be modified in some way to put it into more "salable form." With this idea, besides putting on the lugs for clamping, the pins or posts were placed inside of the cup. Mr. Gilliland frankly admits that, as a matter of fact, the posts do not perform any different function in conducting the heat to the bottom than was formerly performed by the old C-clamp. There is, the defendant testified, in fact, no substantial difference between the actual results obtained in vulcanizing with the old ladle and with the vulcanizer in suit; both operate satisfactorily, and just as good a job of vulcanizing can be done with the ladle as with the vulcanizer. (Transcript, p. 81.) It thus readily appears that there is no necessity that a man should have a college education in order to put pins into this device, mainly as a selling proposition.

Mr. Gilliland's testimony is that having got the idea of the vulcanizer, he proceeded to make a pattern, and not having the necessary tools, he borrowed an extension bit from the Boehl Hardware Company. It was necessary to bore a three-inch hole in the wooden pattern and it was for this purpose that the extension bit was borrowed. Finally, when the pattern was complete, he went down to Kilpatrick's foundry (South St. Louis Foundry) and had them make some castings from the pattern. The castings were made about the sixth or seventh of August, and it was on the seventh of August that the defendant called for and obtained the castings which were good enough to deliver. (Transcript, p. 76.) After getting the castings from the foundry, defendant carried them over to the Southern Auto and Machinery Company, 116 Robert avenue, about a block and a half away from the Kilpatrick foundry, and asked Mr. Miller to haul them up to defendant's house. (Transcript, p. 76.) The castings were rough, full of sand, and some of the pins were broken out; but defendant picked out the best ones, and he and Mr. Miller hauled them up to defendant's house. Defendant smoothed off one of the castings with a file and tried it out the next morning and got a comparatively good job of vulcanizing, although the casting was a rough one. He took this vulcanizer up on Olive street to Mr. Huber, the man who had suggested to him putting in the pins, and showed it to him. (Transcript, p. 76.) After that defendant did not do much with the vulcanizer until September. (Transcript, p. 77.) During that month, he had occasion to ride with Mr. Huhle, an electrician, in Mr. Huhle's automobile, and had one of the vulcanizers in his hand at the time. Mr. Huhle was interested in it and said he would like to have it, as he had just bought

his car and had some tubes that needed repairing. Defendant said "uhle this vulcanizer for one dollar. (Transcript, p. 77.)

Defendant did nothing more at that time, with the exception of getting the witness Shephard, a machinist, to machine off two of the vulcanizers on the surface so that he could continue his experiments with them. These two were machined off by Shephard in the latter part of September. (Transcript, p. 77.) Plaintiff at this time was in such financial condition that he could not go ahead and have good patterns made. He had only drawn about \$350.00 for his year's work from March 15th to the latter part of September, and was badly in debt, so he was compelled to drop the vulcanizer until some time in December, when he took two of the vulcanizers to the Koochook Rubber Company, who told him to have some more made. A little later, in January, he went to the Liberty Foundry and had them make him up some of the vulcanizers, the first lot of which were, however, not received and paid for until February.

The corroboration of Gilliland's testimony is quite ample. It is particularly strong upon the crucial fact of the production of the first batch of vulcanizers at the South St. Louis Foundry in the beginning of August, 1911. This fact is established by the testimony of practically everyone connected with the foundry, namely, witnesses Kilpatrick, Wurley, Shanks, Waldecker, Haase, Mirgain, Stevens, Dillman, Schaefer, and Laundman. Nor are these ten witnesses unsupported by outside evidence, for there is an array of testimony of other witnesses not connected with the foundry.

Taking up first the witnesses connected with the

foundry: The first in order is **Frederick N. Kilpatrick** (Transcript, pp. 41-45). Mr. Kilpatrick testified that he has lived all his life in St. Louis and is secretary of the South St. Louis Foundry, with which he has been connected since 1886, and of which Mr. Gilliland had been foreman about five years before.

Witness was shown the rough vulcanizer castings, Defendant's Exhibits 10 and 15, and testified that he had seen castings similar to them at his foundry in 1911. He thereupon produced duplicate dray tickets, original and carbon copy, issued by him at date of the delivery of the castings to Gilliland, on the regular stationery of the foundry. This dray ticket is dated on August 7, 1911, and witness identified the following as in his own handwriting: the date, "8/7/11," the words, "Call for D. C. Gilliland," the words, "25 Vulcanizer Castings in exchange for 1 set American batteries & spark plugs. No charge," and the weight, "75#." All of the written portions of the ticket he identified as in his own handwriting with the exception of the signature, "D. C. Gilliland," at the bottom, which he testified he saw signed by Mr. Gilliland at his office on the date stated in the ticket, August 7, 1911, at the time of the delivery of the castings (Transcript, p. 41). Witness testified further that he could not say that he saw all the twenty-five castings mentioned in the dray ticket, but saw some of them; they were carried up to the front of the shop, about 300 feet, and were left outside of the office in front of the machine shop. They were left out there, and it was reported to him there were 25 castings and he made out the dray ticket in that way. (Transcript, p. 42.) Mr. Gilliland had offered him the batteries and spark plugs in exchange for the castings, and it was about

an even exchange, and witness let the transaction go in that way. There was no other charge, and a transaction of this nature would not occasion any entry in their books. The names of the employes of the foundry from time to time were kept in a fortnightly time book, in which a man's name was entered and from which his name would be dropped when he quit or was discharged. Among the persons present in the court room, witness identified as employes of the foundry at the time these castings were made, witnesses John Shanks, August Schaefer, Henry Laundman, Jacob Dillman, Charles Haase, William Waldecker, and Joseph Mirgain. (Transcript, p. 43.)

These vulcanizer castings were the only castings they made for Gilliland, as far as the witness could recollect. Independently of the dray ticket, the only way he had of fixing the date was from the batteries and spark plugs. Of these, he says:

"I wanted to use them for a boat at the time which I was trying to buy and did not buy until two or three months later—a motor boat for my own use throughout the summer season, summer and fall from April to December. I finally bought it about October or November of that year, 1911. The batteries and spark plugs were used on father's boat in the meantime. (Referring to the batteries and spark plugs mentioned in dray ticket, 'Defendant's Exhibit A.') I received them from David C. Gilliland. I got them when he got the castings." (Transcript, p. 43.)

Testifying independently of the dray ticket, which is dated, witness fixed his preliminary conversation with Mr. Gilliland concerning the castings about the latter part of July or the first week in August, and would judge the castings were made about the first

week in August. (Transcript, p. 43.) Mr. Kilpatrick gave Gilliland permission to have fifty castings made. He believed they made more than twenty-five, but lost some of them and refused to make any more of them because they could not make them successfully in their shop, as they cater only to heavy work. His clerk counted them and gave him the information from which he made out the dray slip. (Transcript, p. 45.)

Witness **John F. Shanks** testified he had lived in St. Louis for forty years and by occupation was a molder, and was general foreman at the South St. Louis Foundry. He had been there for the last five years and remembered the Gilliland job. The foundry was put up for heavy work, and this casting was what is called "light" casting work, and they had no sand required for that kind of work. Heavy casting requires a coarse sand, and this light casting requires a finer grade of sand. (Transcript, p. 45.) When the job came in, the witness, who was the foreman, thought it was a complicated job and thought it best to make them himself, which he did. Gilliland gave him the pattern. The rough castings lying on the table (Defendant's Exhibits 10 and 15) were made by the witness. He could not swear positively that he made those castings, but he made castings like them. The two rough castings do not differ in any particular from the castings he made. (Transcript, p. 46.) These castings are defective, as they ought to have nineteen pins in each, and some of the pins are broken out. Witness remembered having a pattern, which was brought to him by Gilliland, but could not remember whether it was a metal pattern or a wooden pattern. He poured them, or cast them, himself. Some of them were bad; the bad ones were not taken away by Gilli-

land. Witness could not give a date when the castings were made, but stated that it was before Labor Day, saying:

"It was before Labor Day, that is all I could tell you. We had them before Labor Day, 1911, because in the year before that we were working on big work, you might say, all the way through. Labor Day was the first Monday in September. It was three or four weeks, maybe a month before Labor Day." (Transcript, p. 46.)

Witness further states that Jacob Dillman, Joe Mirgain, Charley Haase, Schaefer, and Laundman (who were all present in the court room as witnesses for Mr. Gilliland) were working in the foundry at the time this work was done. These men had, however, nothing to do with the work. Schaefer was the man who took the castings down to the chipping bench, where they were brushed or cleaned up, and some were taken away without being cleaned. The other men had nothing to do with handling them at all; all they know is that the work was made there. (Transcript, p. 46.)

William Waldecker also testified that he had lived in St. Louis all his life. He was not employed but had been last employed by the Mississippi River Commission. In 1911, the only work he did was at the South St. Louis Foundry. Shanks, Haase, Mirgain, Walsh, Dillman, Stevens, Laundman, and Schaefer were employed there at the same time. It was either the latter part of June or the first part of July, 1911, when he started to work at the South St. Louis Foundry, and he quit in September. (Transcript, pp. 47-48.) During the time he was working there he saw there castings just like the Defendant's Exhibits 10 and 15. He saw around the shop, good and bad, between twenty

and thirty castings. (Transcript, p. 48.) This was at least a month or a month and a half before witness quit the foundry. (Transcript, p. 48.)

On cross-examination the witness said he saw the defective castings lying around the chipping bench about four days. The men used to make remarks about them during the dinner hour, seeing them lying around, and called them "waffle irons." There were at least half a dozen; some of them had the pins knocked out, and others had the lugs broken off; others, after being brushed, had a hollow space when cleaned out. Witness himself handled them, looking at them to see what caused them to be bad. (Transcript, p. 48.)

Witness **Charles Haase**, forty-two years of age, has lived in St. Louis all his life; is a molder, and has worked at the South St. Louis Foundry off and on for about twenty-eight years. It was the first part of August, 1911, when he left there. Before that, he had worked there six or seven months. A few months after that he came back. Speaking of the time when he was there before he quit in August, he did not see the castings, but he saw the pattern. If not mistaken, it was a wooden one. He saw it at the South St. Louis Foundry in August, 1911. Dave Gilliland had it. He had known Gilliland six or seven years or more; had worked for him at the South St. Louis Foundry when Gilliland was foreman there. Witness saw the foreman mold the castings but left before he saw any of the castings. He could not tell exactly when he left the place, whether it was the second or third of August. (Transcript, p. 50.) After leaving there, he went to Timmerman's, the St. Louis Corliss, where he was working at the time of the trial. During the time he

was at the South St. Louis Foundry, Mr. Wurley kept the time book. (Transcript, p. 49.)

On cross-examination, witness said he remembered seeing Gilliland bring in the pattern, and said his memory was very good, that this was in the first part of August, 1911. (Transcript, p. 50.)

Witness **John Mirgain** at the time of the trial was employed at the St. Louis Axle Company. Prior to that, he was employed at the South St. Louis Foundry for ten years. He stayed there until the middle of September, 1911, when he left. He remembered Haase, Shanks, Dillman, Laundman, Schaefer and Stevens being there at the same time. They were all there a month and a half before he quit. (Transcript, p. 51.) This witness also saw the vulcanizer castings made at the South St. Louis Foundry when he was there and said he saw them the latter part of July or the first week in August. He never saw the pattern. He did not see the making of the castings but saw the castings when they were laid out on the chipping bench when they were already cast and ready to be cleaned up. He saw twenty or thirty, more or less.

Witness **Max Stevens** was not employed at the time of the trial, but had been employed off and on at the South St. Louis Foundry as a core maker for about thirteen years. He also had seen castings down there similar to Defendant's Exhibits 10 and 15, but did not handle them. All he did was to handle patterns and put them away; he put all the patterns away after they were cast. When he first saw the wooden pattern down there, he knew it was in warm weather, but could not fix any date. It was about 1911, all right, he knew,

but he could not say whether June or July. He saw the pattern lying on Shank's floor and saw the castings after they were cast. He could not tell how many castings were made. There was a pile of them there, but he could not say how many. They were on the front end of the floor where they shake out and throw them in a pile ready to be taken away. The pattern was put away, and when it was looked for, it was broken up; there were some small pieces found of it, but what became of the pieces he could not say. (Transcript, p. 52.)

On cross-examination, the witness again said that it was in 1911 when he saw this wooden pattern at the foundry and that he knew that it was warm weather when he saw it. (Transcript, p. 53.)

Jacob Dillman, the next witness, was an iron molder at the South St. Louis Foundry and had been employed there off and on for about twenty years; was there during the year 1911. He also identified defendant's Exhibits 10 and 15 as being similar to castings he had seen at the foundry. He thought Shanks was the one that made them. He did not see him molding them, but saw him making the molds and saw the castings after they were made. This witness could not say what the time was. He could not even swear to the year, but guessed it was in the fall some time or some time in the latter part of the year. (Transcript, p. 53.)

August Schaefer, the next witness, was a laborer at the furnace at the South St. Louis Foundry and had been there eleven years. He also testified to having seen castings similar to Defendant's Exhibits 10 and 15 at the foundry. He could not remember the day or

the year. It was several years back, he knew. He remembered they were made, but could not tell when it was. He remembered that John Shanks made them. Witness did not work in the sand at all, but just labored around there. He does not work in the shop, but out in the yard, but he came and wheeled these castings down to the chipping bench himself. They were put in the wheelbarrow and he wheeled them down. He did not think there were over thirty or thirty-five, or probably forty. He never saw any more than just one lot of these castings. (Transcript, p. 54.)

Henry Laundman had worked at the South St. Louis Foundry about twelve years and had seen castings there similar to Defendant's Exhibits 10 and 15. He was not sure how many, but when he saw them they were lying on the bench. It must have been anyhow two or pretty near three years ago, according to witness' recollection. It was warm weather, and just the one lot was all he saw. (Transcript, p. 54.)

On cross-examination, witness said that he thought it was over two years and close to three years before the trial that he saw those castings on the bench. It was in 1911. It was warm weather and he runs the cupola and melts the iron. Being asked if he did not do this in cold weather also, he said, "Yes, but you don't sweat as much as in warm weather." (Transcript, pp. 54-56.)

William C. Wurley, the last witness from the foundry, was the time keeper at the foundry during the year 1911. He attended to most of the shipping and the time keeping, and produced his time book in court at the trial. In this book, they take the days of the

week because the cupola tender and the charger get an extra compensation for heating days; there is more labor attached to it. They enter the time ending fortnightly; the time for each man in both the machine shop and the foundry. They keep the names of all the men that are working. From examination of the time book, witness here testified that Shanks is in the book as foreman during the year 1911. Witness turned to a page in the book covering the two weeks from the first of August to the twelfth of August, 1911. (Transcript, p. 56.) With his time book before him, witness further testified:

"The names of all that were in the foundry during that fortnightly period are: John Shanks, Charles Haase, Joe Mirgain, Jake Dillman, Henry Laundman, Max Stevens, John Brown (he was the driver), August Schaefer, William Waldecker, John Grady, Ed Heckstein, Fred Walsh and John Chew; the last mentioned is an apprentice. Shanks was the foundry foreman. Haase was a molder; Mirgain a molder; Waldecker a molder; Stevens a coremaker; Dillman a molder; Laundman, cupola tender; Schaefer, cupola charger. That leaves John Grady and Ed Heckstein; those two were both helpers. They are not in our employ now. They are both out of the city, I think.

"Shanks had not missed a day since he had been there. He started to work for us the last time on the 27th of September, 1909. He had been working for us off and on, but he left us a few months before that and came back shortly after.

"Haase started in on January 31, 1910, and worked up to August 4, 1911; that is the date of his last employment, and our book shows here that we only heat on the third, it being the day before he quit; run heat the day before he quit, as shown by a little check mark above the number of hours. That is shown by our time book.

"During 1912 Haase started in on April 21 and he worked the 21st and was off all week until the last four days of the two weeks; then he seems to have worked steady for a few days only and stopped again; he worked five hours and that ended his time on the second of June, 1913.

"After he quit on August 4th, 1911, his first employment begun on the 22d of September, 1912. September 14, 1911, was the last day both Mirgain and Waldecker worked there. The two quit the same day. Business got slack on that day and they laid them off on the 14th of September, 1911. They never worked there since.

"The time book shows that we had heat at the foundry on Thursday, the 3d of August. The 10th of August we had the first heat after, and the 29th of July the first heat before." (Transcript, pp. 56-57.)

This witness also remembered seeing castings similar to defendant's Exhibits 10 and 15, at the foundry. Exhibit 10 he remembered particularly from the way it was planed. (Transcript, p. 57). Witness did not count the castings. He counted twenty-five, between him and the helper, to give to Mr. Gilliland. It was witness' first year at the foundry and he knew that it was during warm weather. They have a board over the cupola platform, but they usually take that down in summer on account of the intense heat. In winter they close that up. Witness knew this was done in the time they made them in front of the cupola. He remembered that independently of his records; also, it was his first year at the foundry. He started on September 13, 1910, and was not there quite a year. (Transcript, p. 57.) Mr. Wurley saw the two dray tickets, defendant's Exhibits A and B, made out. He was there when Mr. Gilliland signed the tickets and saw them

signed. As to the delivery of the castings, witness testified:

'We brought the castings in from the foundry and I don't believe we weighed them. We did not weigh the castings. Mr. Kilpatrick, I think, estimated the weight on it as seventy-five pounds. We brought them up through the machine shop; the foundry leads right into the machine shop, and the office is north of the machine shop. We set the castings right outside of the office door and Mr. Gilliland took them. Mr. Gilliland was in the office while Mr. Kilpatrick was making out the ticket and I brought the number of castings in to them. I, myself, furnished the number, twenty-five to Mr. Kilpatrick. There was only one lot that I could remember of that same pattern. The dray ticket had been in my custody all of this time, but Mr. Kilpatrick had access to the files. I produced it the day they took my deposition; I couldn't say what date it was. I saw the date '8/7' written on there at the time.' (Transcript, pp. 57-58.)

This witness also testified that he knew at the time the castings were delivered of the exchange for the patterns, because he wired the boat up himself. It was the old gentleman's boat, Mr. R. J. Kilpatrick's. Witness did some electrical wiring on this boat and also fixed the ignition of the engine, and thought it was with this material that they got from Mr. Gilliland, but was not sure of it; he used it later on for Mr. Kilpatrick's small launch. He got that the latter part of 1911. Some of this material that he got from Gilliland, witness used on that boat, and before that he used it on the "Bessie K.," Mr. R. J. Kilpatrick's boat. Witness took it from the one to the other. (Transcript, p. 62.)

Herman Miller, manager and treasurer of the Southern Auto & Machinery Company, was the next witness for defendant. This witness was shown a paper on the stationery of the Southern Auto & Machinery Company, dated St. Louis, Mo., 8/8/11, and concerning it said:

"That is just one of our dray tickets ordinarily used when delivering goods. This recalls the time when I loaned Mr. Gilliland a pipe vise and a pipe cutter. The ticket is made out in my own handwriting; the signature is Mr. Gilliland's. I remember the transaction, the date was August 8, 1911. I fixed the date from the ticket itself being made out on that date. Mr. Gilliland on the 7th came over with two sacks of castings and asked me if I would at the same time loan him a pipe vise and a pipe cutter inasmuch as we had pipe tools there on account of our water system work, and he had some pipe work to do at his home. I willingly said I would, and he asked me if I would mind hauling those next day, the two sacks, at the same time, inasmuch as the pipe vise was heavy. I consented to do that, but I told him I couldn't do it on the 7th, and on the following day he came back, because I did not know at that time where Beethoven Street was, and delivered the tools and the two sacks of castings. It was apparently on the 7th Mr. Gilliland came to our place of business, the day previous to the day I took them out. It was around noon time, some time; I made the trip up at noon to get my dinner at the same time, if I recall correctly. He told me he brought them from the Kilpatrick foundry. They were lying on the floor by our garage, the front part of our building. He brought them into our garage; they were in two sacks. On the 8th he threw them in the car and we rode up to his house and took them out. It was an Ohio touring car, an automobile. No one else was in the car besides

Mr. Gilliland and myself. Our place of business was at 116 Robert Avenue. It is about three blocks from the South St. Louis Foundry. I got a glimpse of the castings. I judge this to be one; it was similar to that (indicating defendant's Exhibit 10). I was somewhat inquisitive about it, and asked Mr. Gilliland what he had in the bag and asked him if it was junk. He lifted one out and said, 'You might think it is junk, but it won't be junk before long.' That is about the gist of the conversation. Nothing further passed as far as this is concerned." (Transcript, p. 68.)

The dray ticket covering the pipe vise and pipe cutter transaction, which was dated August 8, 1911, was put in evidence (Transcript, p. 69), and witness identified the written portions as being in his handwriting, with the exception of Gilliland's signature. The dates on the dray ticket show that the pipe vise and pipe cutter were loaned to Gilliland on August 8, 1911, and were returned by him on October 12th following. It was on the first-mentioned date, August 8, 1911, that the tools and the two sacks of castings were carried over to Mr. Gilliland's home on Beethoven street in witness' automobile. (Transcript, p. 68.)

Clarence L. Shephard is the next witness for defendant. Witness is a mechanic, having an auto repair shop of his own known as the C. L. Shephard Machine and Auto Repairing Company, at 3613 Gravois avenue, St. Louis. In 1911 he was in the employ of the Franklin Auto Company, of Syracuse, N. Y. They had at that time an office at 1306 Olive street, where witness was working. Witness personally did some work for Mr. Gilliland in turning the bottoms off of some castings he had. It was a casting like Defendant's Exhibit 10, similar in all respects. Witness paid

no particular attention to the castings, but just turned off the bottoms and smoothed them up for him. There were two of them given him by Mr. Gilliland to turn the bottoms off and find out the approximate cost of getting them done by the thousand. This was somewhere between the middle of August and just before the V. P. Ball, which was about the sixth of October. On cross-examination witness testified that he knew it was before the V. P. (Veiled Prophet) ball, because after the V. P. ball he knew they got very busy in the shop and before that they were very dull. They had nothing to do there practically for two months in the shop, but would not have time to do the work after that. This work had no connection with the company; it was done for himself, personally, and took five or ten minutes, along in there somewhere. (Transcript, p. 70.)

Max Huhle, an electric contractor, testified that in August, 1911, he bought a second-hand automobile and found himself in need of something with which to vulcanize his tires, which were giving him trouble, and that about the middle of September he bought one of these vulcanizers from Mr. Gilliland, and vulcanized with it in accordance with Gilliland's directions. He used it with a wooden block, screwing the casting to the wooden block, with the rubber tire between. The first couple of times he used it he put in too much gasoline, but afterwards found out just how much gasoline to use. He was driving Gilliland in his automobile at the time he bought the vulcanizer, and Gilliland had the vulcanizer in his hand. He asked Gilliland what it was, and when Gilliland explained what it was and how it was used he bought it from Gilliland for a dollar. (Transcript, pp. 71-74.) This witness testified

positively that it could not have been as late as October that he bought this vulcanizer from Gilliland. (Transcript, pp. 73-74.)

Harry Spoeneman, brother-in-law of Gilliland, corroborated Gilliland both as to the wooden pattern and the iron castings. Mr. Spoeneman was at the time employed by the Boehl Hardware Company and quit his employment there the third of July, 1911. While he was there, Mr. Gilliland got him to borrow from the hardware company a three-inch bit used to bore a hole three inches in diameter in wood. He saw the piece of wood Mr. Gilliland had bored with it. Mr. Gilliland had a tool bench in the basement where he did his work, and Mr. Spoeneman picked up there the wooden piece which he had bored with the extension bit. At the time he saw it it was painted black. It was a round piece with a hole three inches in diameter and had a lug on each side and was painted black. The casting, Exhibit 10, was identified as being on the order of the wooden piece that he saw in Gilliland's basement. It was about eight or ten days before he quit the Boehl Hardware Company on July 3d that he got this bit, and it was the latter part of July when he saw the wooden piece (or pattern). After that, during August of the same year, he saw castings around Mr. Gilliland's place on the order of the rough casting, Defendant's Exhibit 10. He saw five or six of these castings around the tool bench in the basement. He fixed the date when he saw the castings as in August, because he left there the latter part of August and went to Joplin, Mo., and did not come back to St. Louis until the following summer, 1912. At the time he saw the wooden piece (or pattern) it did not have any pins

inside of the cup, but the castings he saw had pins in them. (Transcript, p. 98.)

The borrowing from the Boehl Hardware Company of this extension bit at the time testified to by Gilliland and Spoeneman was further corroborated by Mr. William J. Baier, who was employed by the Boehl Hardware Company at that time. Mr. Baier testified that he could not fix the exact date of the loan of the bit, but knew that Mr. Spoeneman worked for them about three months and quit on the third of July, so he knew it was shortly before that date. Mr. Spoeneman never worked for them after the third of July, 1911. (Transcript, p. 98.)

Ruth Gilliland, defendant's daughter, nine years old, also testified to seeing castings like Defendant's Exhibit 10 in the basement. She remembered her father making the wooden pattern and remembered his using the lathe in making it. She further testified that the pins in the wooden pattern were made by Mr. Gilliland from pieces taken out of the back of a little doll's chair which belonged to her, and that it was during her summer vacation. (Transcript, pp. 98-99.)

As to Huber, who was the party who originally suggested to Gilliland the idea of putting pins in the vulcanizer, the record shows (Transcript, p. 18) that at the opening of the trial counsel for Gililand announced to the Court that they had been trying to get Huber as a witness, but that in some way or other the marshal had not succeeded in serving him, and asked the Court to direct the marshal to make a special effort to get him into court, stating that he lives and has his place of business at 3150 Locust street, and was evi-

dently evading service. Counsel for complainant also stated that they had made three trips out there and could not locate Huber. Although the trial lasted four days, the marshal did not succeed in bringing this witness into court, and at the close of the testimony, Mr. Holcombe, of counsel for defendant, testified to efforts he had made to get Huber as a witness; that he had a subpoena issued for Huber, and that one or two days later he, himself, saw Huber at his place of business and talked with him. Huber told him that he had not been served with the subpoena and that he did not want to testify. Thereupon, defendant's counsel made a formal tender of the deposition given by Huber in the Shaler case, but this deposition was objected to by counsel for complainant, and the testimony of Huber is accordingly not available.

It is submitted that the defendant's evidence above outlined ought not to be disposed of with the remark that it would serve no good purpose to discuss it. It is submitted that the defendant's evidence is entitled to exactly the same respect and consideration in this cause as if Judge Geiger had never decided the Shaler case, and just as much as if Mr. Gilliland had not been an uncorroborated witness in the Wisconsin case. If the testimony of Gilliland be true, the judgment on the present record must be in his favor; if the testimony of his witnesses be true, the judgment must be in his favor; and if the documentary proof be not faked outright, then again, the judgment must be for defendant. It is not at all necessary that Gilliland's testimony be received, unless we deliberately throw out the testimony of all of his witnesses, and it is scarcely necessary that we rely upon the veracity of either himself or his witnesses if the documentary evidence be received.

Probably the most important single fact is the making of the twenty-five or thirty castings, or vulcanizers, the first week of August, 1911, at the South St. Louis Foundry. In view of the intimation of Judge Geiger that Gilliland's testimony ought not to be accepted as sufficient without corroboration, we have in this case brought in every one who was connected with the South St. Louis Foundry at the time of this transaction, who could be found in the city of St. Louis and reached by a subpoena. All of the possible witnesses on this question have been exhausted. Every man who could give any testimony has been brought into court. One or two of the laborers or molders had no special means of fixing the time other perhaps than by its being prior to Labor Day or by its being during the warm weather when the cupola was open and when the work at the foundry was very hot, but again we have witnesses who testified to seeing these castings, and who were not employed there, as the time book proves, at a later date. Even the testimony that it was during warm weather is not to be regarded as worthless, for we have on all hands the testimony that the only castings that were ever made at the South St. Louis Foundry were the original rough castings which represented Gilliland's first attempt to produce the vulcanizer in accordance with his wooden pattern. These turned out to be so rough and defective that it was necessary for him to have the vulcanizers subsequently made at the Liberty Foundry, which was better equipped for light work. It is not denied by complainant that these castings were made at the Liberty Foundry in February, 1912. This fact, at least, stands admitted upon the record. (Transcript, p. 97.) Further, there can be no question about the rougher cast-

ings having been made at the South St. Louis Foundry at an earlier time, as it was one of these rough castings, smoothed up for the purpose, that he first brought to the Liberty Foundry about the middle of January, 1912, to be used as a pattern, as Mr. Mellow testifies. (Transcript, p. 96.)

Mr. Gilliland explained his going to the South St. Louis Foundry for his first castings and his delay of several months in afterwards going to the Liberty Foundry by his financial condition at the time. By reason of this fact, he was handicapped at every turn, and the same measure of diligence is not to be expected in such matters from a man who is without funds as from a man who is more fortunately circumstanced. Mr. Gilliland had been, five years before, the foreman at the South St. Louis Foundry, and had met there with a severe accident and Mr. Kilpatrick testified that he felt that Gilliland was entitled to any reasonable consideration in the way of making small castings for him without charge. Although, therefore the character of the foundry and the sand used there were not suited to this kind of light work, it was the best that Mr. Gilliland was able to do under the circumstances. That Gilliland was practically without funds throughout the entire period in question is shown by the evidence of all of his witnesses. When he wanted the first castings made he was compelled to go to a foundry specializing in heavy work, solely because it was the only foundry in St. Louis where he could get a small job done in the way of a pure accommodation. The work speaks for itself, the castings being very inferior, although sufficient to fully demonstrate that the idea was a practical one. When the castings were ready for delivery, he again was compelled to ask a friend to

carry them to his home in his automobile. After this, he found it necessary to get another friend to machine off the bottom of a couple of the castings during his off hours, which again was done as an accommodation and without pay. Prior to having this first batch of castings made, he had had to borrow the extension bit from the Boehl Hardware Company, where his brother-in-law, Spoeneman, was employed, in order to bore the three-inch hole in making the pattern, and to make the pattern himself with his lathe in his basement. None of these things are at all extraordinary in the case of the average inventor. They point to a financial condition which is not at all unusual in such cases. On the other hand, such a handicap necessarily creates delays which do not occur when a man is amply provided with funds and all the means of rapid development of his idea are at his command. Mr. Adamson, indeed, with the assistance of Mr. McCormish and his draftsmen and pattern makers, and all the facilities at his disposal, could proceed more rapidly. But even after Gilliland had procured his first batch of some twenty-five or thirty vulcanizers and had found the device to be practical, he was not in a position to have them made in quantities at a foundry suitable to turn out the work in a merchantable condition. Accordingly, Mr. Mellow, of the Liberty Foundry, testifies that even in January, 1912, when Gilliland first came to him about this work, he was still in such circumstances as not to be able to pay the money to get the work done promptly. "We experimented with this pattern several days, a couple of weeks," says Mr. Mellow, "and waiting for Mr. Gilliland to come down and pay us a cash deposit because he had no established credit in St. Louis, or any other means so we could collect if we

should make castings for him in large quantities." (Transcript, p. 96.) In this way, it took about six weeks longer to obtain a delivery of the first castings. Mr. Mellow says: "The first record we have of Mr. Gilliland receiving any castings and paying for them was February 27, 1912."

An analysis of the above record shows that the corroboration of Gilliland upon each important fact is complete, and herein lies the radical difference between the present record and the practically uncorroborated testimony he gave in the Shaler case.

The several facts going to make up Gilliland's defense are as follows:

1. The making of the wooden pattern in July of 1911. This fact is testified to by Mr. Gilliland and directly corroborated by Mr. Spoeneman, his brother-in-law, and Ruth Gilliland, his daughter, both of whom saw the pattern in his basement, where he had his work bench. Spoeneman also testified to having borrowed from the Boehl Hardware Company for Gilliland the three-inch extension bit with which the three-inch hole was bored in the wooden pattern. This loan of the bit is corroborated by Mr. Baier, of the Boehl Hardware Company, who testified that it was borrowed by Spoeneman while working there a couple of days before he quit on the third of July, and was returned within a couple of weeks. (Transcript, p. 97). This wooden pattern was used by Shanks at the South St. Louis Foundry in making the castings there, as testified by him (Transcript, p. 46), and was also remembered by Haase (Transcript, p. 48), and Stevens (Transcript, p. 52.)

2. The making of the twenty-five or thirty castings

at the South St. Louis Foundry in the first week of August, 1911. For this fact, we have the direct evidence of Gilliland, supported by:

- (a) Kilpatrick, manager of the foundry, and Wurley, shipping clerk and timekeeper, who testified to delivering the castings to Gilliland on August 7, 1911. (Transcript, pp. 43 and 57.)
- (b) The original dray ticket made out at the time by Kilpatrick, and signed by Gilliland in the presence of Wurley, dated in Kilpatrick's handwriting "8/7/11." (Transcript, p. 42.)
- (c) The testimony of Shanks, the foreman, and Waldecker, Haase, Mirgain, Stevens, Dillman, Schaefer and Laundman, molders and laborers at the foundry, who testified the castings were made during the summer of 1911, while it was warm weather, and several of them fixing the date during the first week in August.
- (d) The foundry time book, which shows that the witnesses produced were practically all of the men employed at the foundry during the first part of August, 1911, excepting two helpers who were not in the city at the time of the trial. (Transcript, p. 56.) The time book shows that Shanks was foreman during 1911; that Haase quit the foundry on August 4, 1911, and did not work at the foundry again until the 22d of September, 1912. (This witness testified that just before he left he saw Shanks working on the molds, but did not see the castings made and never saw the castings.) Both Mirgain and Waldecker worked there during August, but quit on September 14, 1911, when they were laid off and have never worked at the foundry since. (These two men testified that the castings

were made about a month and a half before they quit.) (Transcript, p. 56.)

(e) The date of delivery of these castings was further corroborated by the testimony of Miller, manager and treasurer of the Southern Auto & Machinery Company, who carried the castings in his automobile to Gilliland's home on August 8, 1911; and Mr. Miller's dray ticket, dated 8/8/11, covering the delivery to Gilliland of a pipe vise and pipe cutter, which were delivered at the same time with the castings. (Transcript, p. 68.)

3. The corroborative testimony of C. L. Shephard, a mechanic, who machined off the bottoms of two of the rough castings for Gilliland at the shop where he was employed, between the middle of August and the first part of October, 1911. (Transcript, p. 70.)

4. The testimony of Huhle, who bought one of the vulcanizers from Gilliland during September, 1911. (Transcript, p. 71.)

All of the above testimony relates to transactions prior to Adamson's alleged invention or production of this vulcanizer; and if any part of the above evidence is true, Adamson is not entitled to the decree in this suit. When the fullness of this corroboration is considered and the fact is taken into consideration that Gilliland cannot be foreclosed here without rejecting the entire array of his witnesses and throwing out all of his proofs, it is hardly believed that any further argument is necessary. It is indeed seldom that a Court finds itself compelled to adopt such drastic means to support a decree.

So far, we have spoken of Gilliland and his wit-

nesses. It is submitted that they are entitled to credit and that their testimony is decisive of the case. Nor can we understand by what process of reasoning suspicion is to be cast upon all of these men without doing so upon the sole principle, announced by the District Court, of considering ourselves bound at the very outset "to follow the decision of the Court in the first instance." If, of course, we must follow Judge Geiger, no possible amount of evidence can avail; on the other hand, if the evidence is to be examined at all, we respectfully contend that the evidence set out in this record is beyond dispute.

On the other hand, we cannot refrain from suggesting that there is at least some ground upon the face of the complainant's own case, for suspecting his evidence. Mr. Adamson testified that he was the superintendent of the McGraw Tire & Rubber Company, of East Palestine, Ohio; and although there is no hint in his testimony of any meritorious claim whatever on the part of Major or of the McGraw company, he admitted on cross-examination that he paid the sum of \$20,000 in order to get rid of the interference proceeding filed by Major and backed by the McGraw Tire & Rubber Company, and it was in this manner that Adamson obtained his patent. This, he admits in his own cross-examination. (Transcript, p. 38.) He was followed by his witness Vernia, who described himself as Mr. Adamson's "traveling agent," who, in his cross-examination, was confronted by Mr. Mellow while on the stand and was forced to admit that he had lied to him for the purpose of furthering Mr. Adamson's interests in this suit. The character of this assistant of Mr. Adamson, and the nature of the services ren-

dered by him in his lawsuits, is indicated by the following from his cross-examination:

"Q. What did you say was your business? A. I probably told him—

Q. No, what did you tell him? A. I told him I was connected with Dike.

Q. What else did you tell him? A. That is all that I can remember.

Q. Are you connected with Dike? A. No, sir.

Q. What reason had you for telling him a lie? A. Telling him what, I beg your pardon?

Q. What reason had you for telling him that lie? A. I wished to gain some information which I had found was hard to gain if these people who manufactured infringements knew who I was and who I represented.

Q. You felt a liberty to lie to him in order to get certain information, did you? A. Under the circumstances, he being an infringer, I took that liberty." (Transcript, pp. 40-41.)

It is respectfully submitted that upon the facts presented by this record, the respondent having made a complete case of anticipation of the patented device, is entitled to have the ruling of the United States Circuit Court of Appeals for the Eighth Circuit sustained.

JAMES A. CARR,
T. PERCY CARR,
Solicitors for Respondent.

ADAMSON *v.* GILLILAND.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 396. Submitted November 13, 1916.—Decided January 8, 1917.

Upon considering the evidence the court finds grave reasons for agreeing with the District Judge that the respondent copied the petitioner's patented invention.

The rule which gives conclusive effect to a finding made by a judge who saw the witnesses, when there is testimony consistent with it and the finding depends on conflicting testimony or the credibility of witnesses, is peculiarly applicable in a case wherein a patent is assailed by oral evidence of an alleged unpatented anticipation.

One who opposes a patent by oral evidence of a prior discovery, must prove his case beyond a reasonable doubt. *The Barbed Wire Patent*, 143 U. S. 275, 284.

227 Fed. Rep. 93, reversed.

THE case is stated in the opinion.

Mr. Percy B. Hills and Mr. Douglas W. Robert for petitioner.

Mr. James A. Carr and Mr. T. Percy Carr for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the petitioner for the infringement of a patent for a vulcanizing device, "including a vulcanizing member constructed to retain a combustible fluid upon and in contact with its upper surface, the lower surface of the vulcanizing member being adapted to be applied to the material to be vulcanized." In other words, the upper side of the upper of two sheets of metal, between

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which, when heated, the material is to be vulcanized, is fashioned as a cup in which gasoline can be burned to heat it. The specific character of the machine has made of it a valuable success. The respondent admitted making and selling devices like the plaintiff's but alleged and testified that he made them first. In a previous suit by the plaintiff the plaintiff and the present defendant testified and District Judge Geiger gave the plaintiff a decree. In this case again the District Judge in his turn saw the defendant and heard additional evidence, but after criticising it said that his own judgment was that the new testimony would not have changed Judge Geiger's opinion, and while professing to follow that opinion according to the usage of District Judges in such matters, evidently, to our mind, signified that he agreed with Judge Geiger, although in terms only following what had been done. The Circuit Court of Appeals treated the action of the District Judge as a mere yielding to the authority of the former decision and reversed the decree upon the evidence as it stood in print.

We are unable to agree with the Circuit Court of Appeals. There is no question that the plaintiff did not copy the defendant, that he put his invention into the market in November, 1911, and that the defendant did not put out his vulcanizer until February or March of the following year; but the defendant says that on August 7, 1911, twelve days before the plaintiff made the drawing that depicted his invention, he had had castings made that are substantially identical with the plaintiff's device and identical in particulars that the plaintiff's patent made material, but that the defendant declared to answer no useful end. The plaintiff's cup had pins projecting from the bottom arranged in circles around a central one, which his specification described as serving to conduct the heat of the flame downwards into the vulcanizing plate and the combustible fluid. The defendant's original casting

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showed pins of similar arrangement. He explained that the similarity was accidental, that the pins were of no use, but that "we expected to tell the poor, unsuspecting public that they conducted the heat to . . . the bottom of the vulcanizer," "which is a false statement." It needs no emphasis to point out the improbability that the defendant at nearly the same time as the plaintiff should have hit by accident upon the same configuration in striking particulars that he regarded as immaterial, and, merely to deceive the public, have invented the same by no means obvious explanation that was offered seriously by the plaintiff but that the defendant regarded as false. The improbability is intensified by a further coincidence also explained by the defendant as accident. The lugs by which the cup was to be fastened to the lower surface happened to face in opposite directions in the plaintiff's device, although later they were made to face the same way. The defendant's also faced in opposite directions. It surpasses the power of belief that a man who testified that there was nothing in the invention, that it was merely arranging to fasten a ladle to a board, should have come by pure chance to make so exact a replica of the plaintiff's specific form. Inspection of the two castings shows more clearly than can words that one must have been a copy of the other. The plaintiff and defendant lived far apart. Adamson had no chance to copy Gilliland. On the other hand after Adamson's vulcanizers were made public Gilliland could copy them. The man who made the castings shows that the resemblance was even more complete than we have stated by reason of the presence of a base plate, although Gilliland denies that he had one at that time.

There is no doubt that the defendant had castings made. The essential question is the time when they first were made. We shall not discuss the evidence of those concerned in the making beyond recurring to the impression that the witnesses made upon the District Judge and

mentioning that a dray ticket relied upon as fixing that date appears to have been open to grave suspicion from its character, marking and other details. Considering that a patent has been granted to the plaintiff the case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses "depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable." *Davis v. Schwartz*, 155 U. S. 631, 636. The reasons for requiring the defendant to prove his case beyond a reasonable doubt are stated in the case of *The Barbed Wire Patent*, 143 U. S. 275, 284. Upon these considerations and a review of the evidence we are of opinion that the decree must be reversed.

Decree reversed.